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Yours truly  
B. R. Curtis.





A

# MEMOIR

OF

BENJAMIN ROBBINS CURTIS, LL.D.

*by  
George Ticknor Curtis*

WITH SOME OF

HIS PROFESSIONAL AND MISCELLANEOUS  
WRITINGS.

EDITED BY HIS SON,

BENJAMIN R. CURTIS.

VOL. II.

BOSTON:  
LITTLE, BROWN, AND COMPANY.

1879.  
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## CONTENTS OF VOLUME II.

	PAGE
A BOWDOIN PRIZE DISSERTATION . . . . .	1
Written at Harvard College in 1828. "How far may Political Ignorance in the People be relied on for the Security of Absolute Government in Europe?"	
A BOWDOIN PRIZE DISSERTATION . . . . .	13
Written at the Law School of Harvard University in 1830. "The Present Character of the Inhabitants of New England, as resulting from the Civil, Literary, and Religious Institutions of the First Settlers."	
ADDRESS DELIVERED AT DEERFIELD . . . . .	39
An Address delivered at Deerfield, Mass., February 22, 1832, being the Centennial Anniversary of the Birthday of Washington.	
ASA OLMSTED <i>versus</i> DANIEL WELLS . . . . .	62
Action for a Libel.—Brief for Argument for Defendant.	
THE CASE OF THE SLAVE MED . . . . .	69
Argument before the Supreme Jndicial Court of Massachusetts, August, 1836.	
DEBTS OF THE STATES . . . . .	93
First published in the "North American Review" for January, 1844.	
REFORM OF LEGAL PROCEEDINGS . . . . .	149
Report of the Commissioners appointed to revise and reform the Proceedings in the Courts of Justice in this Commonwealth, January, 1851.	
UNITED STATES <i>versus</i> ROBERT MORRIS . . . . .	172
Charge to the Jury in the Case of the United States <i>versus</i> Robert Morris, before CURTIS and SPRAGUE, JJ., November 11, 1851.	

	PAGE
<b>ARE JURIES JUDGES OF THE LAW? . . . . .</b>	176
Judicial Opinion on the Question, whether Juries are rightfully Judges of the Law, in Criminal Cases, in the Courts of the United States, pronounced in the Case of The United States <i>versus</i> Robert Morris, October Term, 1851.	
<b>GREENE <i>versus</i> BRIGGS . . . . .</b>	191
Judicial Opinion on the Constitutional Validity of an Act of the General Assembly of Rhode Island "for the Suppression of Drink- ing-houses and Tippling-shops," delivered November Term, 1852.	
<b>ON THE OFFENCE OF OBSTRUCTING PROCESS OF THE UNITED STATES . . . . .</b>	205
A Charge delivered to the Grand Jury of the United States Circuit Court for the District of Massachusetts, June 7, 1854.	
<b>DRED SCOTT <i>versus</i> SANDFORD . . . . .</b>	213
Dissenting Opinion in the Case of Dred Scott <i>versus</i> Sandford, deliv- ered in the Supreme Court of the United States, March 27, 1857.	
<b>EXECUTIVE POWER . . . . .</b>	306
A Pamphlet first published in October, 1862.	
<b>CHARACTER AND PUBLIC SERVICES OF CHIEF JUSTICE TANEY</b>	336
Remarks made at a Meeting of the Boston Bar, October 15, 1864.	
<b>ARGUMENT IN DEFENCE OF PRESIDENT JOHNSON . . . . .</b>	348
Delivered before the Senate of the United States, sitting as a Court of Impeachment, April 9, 10, 1868.	
<b>UNITED STATES <i>versus</i> UNION PACIFIC RAILROAD COMPANY .</b>	423
Argument in the Case of The United States <i>versus</i> The Union Pacific Railroad Company et al., United States Circuit Court, Hartford, Conn., September 19, 1873.	
<hr style="width: 20%; margin-left: auto; margin-right: 0;"/>	
<b>INDEX TO VOLUME II. . . . .</b>	437

PROFESSIONAL  
AND  
MISCELLANEOUS WRITINGS.

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A BOWDOIN PRIZE DISSERTATION,

WRITTEN AT HARVARD COLLEGE IN 1828.<sup>1</sup>

---

*How far may Political Ignorance in the People be relied on for the Security of Absolute Government in Europe?*

THE relations between different countries and different classes in the same country are intricate and variable. Slight modifications in the circumstances make such wide difference in events, that it is almost impossible to predict with certainty whether a political scheme will succeed or fail, whether its effects will be good or bad.

Notwithstanding all this doubt attending political subjects, there are principles which may be applied to them with certainty and success; principles which take the nature of man, stripped of all adventitious circumstances, as their broad foundation, and which are always applicable as long as that foundation remains unchanged. The only difficulty is to apply these principles coolly and carefully to particular cases, making the necessary allowance for the circumstances with which those cases may be attended.

<sup>1</sup> *Ante*, vol. i. p. 38.

## 2 PROFESSIONAL AND MISCELLANEOUS WRITINGS.

Any one who reads the history of Europe for the last fifty years, who perceives the vast changes which have taken place in the constitutions and governments of that quarter of the world, will be impressed with the idea that the causes which have led to these changes are general and widely prevalent. He cannot avoid perceiving that all the countries of Europe partake in some degree of the spirit which has overturned so many thrones and brought war and confusion into so many communities. He will not believe that an effect so general is to be ascribed to very partial and limited causes. The question which then occurs is, Where are we to look for those causes? I answer, In the constitution of society in Europe.

The Northern nations who burst the barriers of the Roman Empire, and spread themselves over the most flourishing countries of Europe, soon became sensible of the advantages and pleasures of civilization. They adopted the improvements, and in some instances the language, laws, and manners, of the more cultivated nations whom they had conquered. The sovereigns divided the land among their officers, who held their property on condition of performing certain services for the crown.

Thus originated the celebrated feudal system, which has had such an important influence on the condition of Europe,—an influence which has never for a moment ceased to be felt down to the present time.

This system was founded at a period when the common people had no rights and privileges except those which the king and the nobles chose to give them, and when they had no security for them after they were actually obtained. But in process of time things began to wear a different aspect. We find one part of the people gradually acquiring wealth, together with the importance which always attends it. They were at first weak, and forced to join sometimes one party and sometimes another in those endless disputes between the nobles and the crown.

Time, however, added to their strength, success gave them confidence, and thus a new order had arisen, for whom no adequate provision had been made by states which had been constituted long before that order existed. In some cases, where circumstances were peculiarly favorable, they rose in their strength and wrested from the hands of the sovereign those privileges which they had the power and the right to possess.

Where they have not been thus favored by circumstances, they have remained to this day without those rights which belong to them as men,—a discordant element in the society in which they exist,—protected, indeed, to about the same degree, and for nearly the same reasons, that the game in the royal forests was anciently protected,—because the noble huntsman chose to kill it all himself.

I have said that this middle class forms a discordant element in the state which virtually denies them existence, and it is to the creation of this class that we must look for one of the principal causes of the revolutions of modern times. The men who compose it are conscious that their knowledge and wealth entitle them to a high rank in the state: they may abstain from action, but they will not abstain from hope. They will constantly look forward to a change, and, though a revolution may be a fearful and a desperate resource, it will be resorted to; for we must bear it in mind that there are always enough of “the irritable who are sensible to oppression, of the high-minded who feel disdain and indignation at abusive power in unworthy hands, and of the brave and bold who love honorable danger in a generous cause.”

The entire influence of this body of men tends to substitute a government which shall secure to them their private and political rights for one which does not even acknowledge those rights, much less secure them. And this tendency becomes more and more direct in proportion as the power to make the change increases.

No one will deny that such a class of men as I have

#### 4 PROFESSIONAL AND MISCELLANEOUS WRITINGS.

described does exist in every country in Europe and every enlightened man looks to them as the cause of the revolutions which have shaken that quarter of the world to its centre, and poured out like water the blood of a whole generation.

It may seem paradoxical to assert that a small body of men, who possessed no share in the government, could be the cause of such important events; but the true secret of their power lies not in their physical strength, but in their ability to influence and animate the mass of the people.

I have not made a forced and unnatural distinction between this middle class and the mass of the people. A distinction does in reality exist, and always must exist, between knowledge and ignorance, poverty and wealth. Allowing therefore what is perfectly true, that this body of men who are superior to the mass of the people, but who are connected with them by a community of feelings and interests,—allowing that they are hostile to absolute governments, and that their power principally consists in the influence which their knowledge and wealth give them over the people, the grand question then must be, How far will political ignorance in the mass of the people prevent this influence from being felt?

The benevolence of the Deity has provided men with faculties which in time adapt themselves to almost any circumstances in which they may be called into action. But, after having been a long time accustomed to a certain set of operations, it is extremely difficult for them to perform any others. The mind as well as the body must be not only strong, but well disciplined, in order to act with promptness and vigor in new and untried situations. It is hard to turn men's minds from the old and deeply worn channels in which they have long been flowing. Now there is a sameness in the occupations of the lower classes in civilized society, which almost necessarily confines their minds within very narrow limits. They have nothing to carry their

thoughts away from the little spot of earth on which they live: it is there they find their food and drink and lodging, and these are to them the main things of life. Every day's experience shows that this is true, in some degree, even of men of considerable refinement and education,—of men whose professions are of a more dignified and intellectual nature; how much more, then, must it be true of those whose knowledge is confined to one simple art, and over whose weak and uncultivated minds habit must exercise such an unbounded sway! The advantages of early education they have never enjoyed. From infancy to manhood, from manhood to old age, their view is bounded by the narrow horizon which their senses have drawn around them; and they remain ignorant, not only of the nature, but even of the existence of objects beyond. “The thoughts which wander through eternity” are to them untried things, and darkness broods over their minds as it did over chaos before the Spirit of God rested there.

I would not be thought to entertain degraded views of human society. I know that men of education are but too apt to undervalue the attainments of those who are below them in point of cultivation. But I believe that general ignorance does produce the effects I have described, and it scarcely needs to be proved that these effects are fatal to liberty.

There are many causes why a people politically ignorant cannot be roused to action. Perfect political ignorance must be accompanied by indifference to the general interests of society, and thus one of the most powerful motives which can act on the human mind is totally destroyed. The love of man, the thought that after ages will feel the effects of present events, has nerved many an arm that would otherwise have remained weak and inactive. There are temptations enough to draw men from pain to pleasure, from labor to ease; and, when one motive to generous exertion is taken away, no man can tell how much the world

## 6 PROFESSIONAL AND MISCELLANEOUS WRITINGS.

may lose. He who is unacquainted with the relations in which he stands to others acts, of course, without reference to them. He who sees not that strong and uninterrupted chain which binds together distant events cannot estimate aright the importance of his actions. He who is unconscious of the ties which connect him with every individual of his species feels no obligation to make sacrifices for their welfare or happiness. Can such a man understand why he should make sacrifices and incur dangers to reform a system of government, because it is highly injurious to the interests of posterity and the world? He would be much more likely to exclaim with the member of the Irish parliament, "What has posterity done for me that I should make such sacrifices for them?" Can he comprehend why he should contend for principles, and not for actions; why he should resist as firmly an act of oppression which does not press very heavily on him at the moment, as he should one which took the bread from his own mouth or the mouths of his family?

This cannot be expected from a man totally ignorant of the principles of government. "There is little danger from the commons," says Bacon, "except where you meddle with points of religion, or their customs, or their means of life;" and, doubtless, Bacon spoke truth of commons, such as the English were under the reigns of Henry VIII., Mary, and Elizabeth, and of such as may be found even at this day in many countries of Europe. If they are in want of the necessities of life, they desire relief: if relief is not obtained, they may be roused to violence, but they will vent their fury on some petty object which is, perhaps, the innocent cause of their sufferings, while the grand difficulty remains unremedied, and even undiscovered; and when the little strength starvation has left them has been expended, or when a temporary relief for their necessities has been found, they go back to their old condition, and remain quiet, if not satisfied.

There are few governments sufficiently strong to resist the united force of a whole people ; but how seldom are the united exertions of a people directed to a particular end ! They have not sufficient discernment to perceive the course which it is for their interest to pursue. In remote and apparently trifling causes, the most serious political difficulties often originate, — causes which are not to be detected without considerable political skill. Possessing no knowledge of the politics of their own country or of foreign nations, ignorant of the rights which belong to them as men, and taught by sad experience to pay a blind obedience to arbitrary power, it is natural that they should look on all measures, except those which have a direct and pressing influence on their persons and property, with total indifference. The subject of a despotic sovereign is not called upon to deliberate, to doubt, or to reason : he has only to obey ; and, when obedience is the only habitual and safe course, ignorant men will hardly trouble themselves about forms and principles. They have wants and desires, but they are few and easily satisfied. They are men, and must become attached to the spot on which they live and the customs in which they have been educated ; but, as long as these are inviolate, they will look on all else with a cold and careless eye.

That tremendous tribunal which we call public opinion can be exercised only by an enlightened and judicious people. It requires a free and rapid circulation of thoughts and opinions, a high degree not only of political information, but of political discernment and skill. It depends for its strength and efficacy upon freedom of thought and cultivation of mind. The judgment is not its only instrument : the heart must be enlisted in its cause. Sympathy with the sufferings of others, strong hatred of injustice, — in short, some of the noblest feelings of our nature, — must be excited before public opinion can become truly formidable, before it can assume that resistless power which God, when he formed man for society, intended that it should have. It

## 8 PROFESSIONAL AND MISCELLANEOUS WRITINGS.

can never have a decided effect where the great majority do not understand the subject on which they are to decide. It is only when the people are enlightened, when they are in a right direction, that they are truly invincible.

I do not deny that public opinion is formidable, even when erroneous; but its influence must necessarily be short-lived, for the truth will come at last to put an end to its power, or to give it another direction. A people cannot judge of the fitness of means to produce ends, or of the consequences which are to follow from causes with which they are wholly unacquainted. "I know of no other guide for the future," said a great statesman, "except the experience of the past," — an experience which an ignorant people does not possess.

It is evident, therefore, that this tribunal cannot exist among a people politically ignorant, and that all the advantages which may be derived from it, all the unity of thought and action which it tends to produce, are lost to them.

It has been said "that he is not a slave who burns to recover his freedom." But not even this redeeming quality can be urged in favor of an ignorant people. Slavery has pervaded every thought and feeling. It has reached the mind and corrupted the very sources of life. They have not the energy to wish to be free. They are more ignorant of the blessings of freedom than the blind man is of the beauties of nature; and they see their children growing up around them without making one exertion to obtain for them those blessings, being ignorant even of their existence.

They have no political spirit; for there are only two ways in which political feeling can be kept alive in a people, — either by giving them some share in the government, or by cherishing in them a military spirit, and by teaching them to look upon themselves as the defenders of their country and the guardians of its glory. The former of these conditions cannot, from the nature of the case, be complied with

under an absolute government; and the introduction of standing armies has shown the peasantry but too plainly that they are not relied on as the defenders of their country, and has destroyed in them much of their interest in its welfare and their hatred of its oppressors.

It requires more subtlety than the ignorant possess to separate the idea of their country from the government which exists in it, and to be able to venerate the one, though they may hate and despise the other: when they perceive that self-aggrandizement is the object of their rulers, that the welfare of the people enters but rarely into their thoughts, and then only in connection with their own interests, it is not strange that they should shrink within themselves and leave their country to its fate. They perceive that they are mere ciphers in the state, and they lose all their energy and spirit, and become ciphers in reality: so true is it "that the estimation in which any body of men is held soon becomes the standard by which that body of men measure themselves." Doubtless there are giant minds which have slumbered since their birth, unconscious of the powers they possess and of the wonders they might achieve, if called into action. And thus it is with a people politically ignorant. They have slept for ages, ignorant of the vast force which resides in them. They know not, and as long as they are politically ignorant they never can know, that a remedy for all their sufferings is within the reach of their outstretched arm; and the political fabrics which would crumble in their grasp are suffered to remain uninjured, except by the clumsiness of those to whose care they are intrusted. Whether knowledge will ever come to start the blood which has been sleeping in their veins, and to point to the path which leads to liberty and happiness, is not for me to decide; but, until it does do this, the people will remain a dark and heavy and motionless mass at the very bottom of human society. The agitations and struggles of those above them may move them to and fro for a

time, but they will settle down again to their old place as dark and as motionless as before.

But there is another view of the subject, and one which it would be well for despotic sovereigns to examine closely.

If the life-blood in their own veins is drawn from the hearts of the people, then must corruption in the one produce disease in the other. No government can be strong and flourishing while the national character is weak and degraded. A government must flourish and decay with its subjects ; and, when a prince makes a law or performs an action which has a tendency to injure the character or prosperity of the nation, he injures himself. He is jealous of the increasing wealth and importance of the people, of their obtaining sufficient light to show them the position in which they stand, and he exerts himself to shut it out from their eyes, and to keep them wandering in darkness ; not perceiving that he thus weakens himself, and renders his own situation more uncertain and dangerous.

He aims a blow at what he foolishly considers a hostile power, and it recoils upon his own head. This course of policy has been pursued for ages by the sovereigns in the East, and it has uniformly produced the same result. While the people have remained in the lowest state of degradation, the sovereigns have gone on adding to their power, with no foundation on which to build it but the weakness of their subjects. They have undermined their throne while they were increasing its outward splendor, and at the moment when it seemed to be secure it needed but an infant's touch to dash it from its foundation.

It is true that even this feeble blow was often wanting, but that was in the East where the vigor of men's minds and bodies had sunk under the united influence of an enervating climate, a degrading religion, and a despotic government. It could never be wanting in Europe ; least of all, could it be wanting among a people who burnt their own

capital to destroy an invader, or among another who answered a summons to surrender what it seemed impossible to defend with the stern exclamation, "War to the knife-point!"

I have thus far endeavored to show that, in the first place, there is a class of men living under the absolute governments of Europe who are decidedly hostile to absolute government,—they feel that they do not occupy the station to which they are naturally entitled by their knowledge and wealth, and are constantly striving to attain it; in the second place, that, as long as the subjects of a despotic sovereign are politically ignorant, they will be inactive, or that their exertions, if made at all, would scarcely be dangerous to a vigorous government; in the third place, that political ignorance must degrade the people, and consequently weaken the government and lessen the difficulty of overthrowing it. I do not believe, therefore, that political ignorance in the people can be relied on for the preservation of absolute government in Europe. The lottery of political events produces fearful combinations of circumstances, and every year, as it passes, may bring forth some mind capable of starting up and taking advantage of them. Do you ask why this has not already happened? Why the iron hand of arbitrary power has so long grasped some of the finest countries in Europe? I answer, that this is not to be attributed to political ignorance alone, but also to religious ignorance. Princes have taken shelter under the cross. Superstition has been called to their aid, and, clothed in the garment of religion, has assisted to keep men in bondage. In the words of Burke, "They have consecrated the state, that no man should dream of beginning its reformation by its subversion."

They have called to men to beware, for the spot on which they stood was holy ground. But let religious ignorance once be removed, let commerce, agriculture, and manufactures flourish,—let the resources of the people be fully

## 12 PROFESSIONAL AND MISCELLANEOUS WRITINGS.

developed,—and then a despot would scarcely look down from his throne with confidence on such a people, even though they were politically ignorant. That one absolute government in Europe may support another, experience proves; but this very necessity shows that political ignorance is not to be relied on.

[A first Bowdoin Prize was awarded in 1829 to Benjamin R. Curtis of the Senior Class for the foregoing dissertation.]

## A BOWDOIN PRIZE DISSERTATION,

WRITTEN AT THE LAW SCHOOL OF HARVARD UNIVERSITY IN 1830.<sup>1</sup>

---

*The Present Character of the Inhabitants of New England, as resulting from the Civil, Literary, and Religious Institutions of the First Settlers.*

“Our brave progenitors, who rose  
Against oppression with warlike mind,  
And shrunk from vain observances, to lurk  
In woods, and caves, and under dismal rocks,  
Deprived of shelter, covering, fire and food:  
Why? For this very reason,—That they felt,  
And did acknowledge, wheresoe'er they moved,  
A spiritual presence, oft-times misconceived,  
But still a high dependence, a divine  
Bounty and government, that filled their hearts  
With joy, and gratitude, and fear, and love,  
And from their fervent lips drew hymns of praise,  
With which the deserts rang.” — WORDSWORTH.

WITHOUT arrogating to ourselves a high degree of superiority over our ancestors, it cannot be doubted that we are sufficiently removed from them, both in point of time and temper, to form a fair and even liberal opinion of the worth of their institutions.

To point out the causes which brought them to this country, and their principles of government and religion after their arrival here; to trace back, as far as lies within our power, to those principles and the institutions which sprang from them, the character of the present inhabitants of New England,— are the objects of this dissertation.

<sup>1</sup> *Ante*, vol. i. p. 44.

Henry VIII., the first English sovereign who entirely threw off the yoke of the Bishop of Rome, knew from experience the use which might be made of ecclesiastical power : and he did not neglect the opportunity which presented itself, of taking that power entirely into his own hands. He constituted himself the head of the Church, and required that all should acknowledge him as such.

There had been, however, for a considerable length of time in England a body of men in advance of the rest of the nation in religious knowledge and religious opinions. They were not only prepared to reject the supremacy of the Pope, but they were unwilling to admit the supremacy of any earthly potentate, looking to Christ alone as the head of the Church.

These men gradually but constantly increased during this and the succeeding reign, till Mary came to the throne, and brought back, as far as was in her power, the ancient forms of worship, together with that spirit of persecution which had ever accompanied them.

Numbers of this sect then went abroad, and prosecuting their studies with greater zeal and freedom than before, they strengthened their former opinions, and widened the breach between themselves and the Anglican Church, by their intercourse with the reformers on the Continent.

At the accession of Elizabeth, they returned to England, and being animated with a spirit of opposition to the government, in addition to their former zeal, since they did not find there that encouragement and support which they had expected, they exerted all their energies to spread their opinions among the people, to whom these opinions were from their very nature attractive ; so that when, in the reign of James I. and Charles I., the arm of the civil power was raised to chastise the nonconformists to the Church, they numbered among themselves some in very high rank, many who were respectable for their birth and wealth, and a great number of well-educated, active-minded men.

It was not in the nature of free-spirited Englishmen to submit quietly to be punished for their religious opinions. Still less was it consistent with their firm and almost obstinate tempers to relinquish those opinions, for which many of them had already suffered.

An alternative only remained,—either to resist the government or to leave the country. For the former, the nation was not yet ripe. They adopted the latter alternative, and came to America.

It may be fully proved that religious persecution, and a desire to find a place where they might worship God in their own way, were the causes which brought them to this country, not only by a consideration of the circumstances which I have suggested, but also by the fact that, as soon as the Parliament obtained the ascendancy and the persecution of the Puritans ceased, emigration ceased also.

It is hardly possible for us at this day to form too high an estimate of the strength of motive and the firmness of purpose necessary to the accomplishment of a design like that which our fathers undertook. We live in a country where the idea of such expeditions is familiar to all from their infancy. But the idea which is so familiar to us was entirely new to them. They had not the benefit of those habits, and of that knowledge and skill which experience alone can give. They knew not what would be necessary or useful to them in their new undertaking. They were unassisted by any of the modern improvements in the arts and sciences, whose effects may be perceived at this day, even in the log hut of a frontier settler. The man who now goes forth into the wilderness feels that he may easily and safely return; and that, even if he remain, the tide of civilization will soon be rolling over the spot where he has fixed himself. Not so was it with our fathers. The broad ocean intervened between them and their native land,—an ocean whose navigation was then but little known and greatly dreaded. Imaginary dangers and difficulties were

doubtless added to those which really existed, but there were enough of the latter to appall a stout heart. In the face of all these dangers and difficulties, they landed in America; a world all before them, and feeling in their inmost hearts that Providence was their guide.

They were shut in, on the one side by the sea, on the other by a vast, untouched wilderness, filled with a strange race of men, of whom they knew nothing but their savage and treacherous temper.

They were dependent on their native country for many of the necessities of life. Their lands when cleared were not worth the money expended in their improvement; and, while they were in the midst of all these sufferings, their ears were filled with tales concerning the fruitful soil and delightful climate of Virginia and the West Indian colonies, to which they were invited to remove.

It is not strange that some among them wavered. It is indeed wonderful that they did not relinquish their attempt, and leave the comparatively cold and barren soil of New England for other and happier climes.

Indeed, in the years 1641 and 1642, when a very general depression was felt,—when the merchants were unable to pay their debts and the farmers had nothing wherewith to buy,—it seemed as though the last days of the colony had arrived.

It was then that the influence of such men as Winthrop and Cotton and Bradstreet and Dudley was felt; men who had transferred the full strength of their affection from Old England to New; who felt for this land not only common patriotism, but all that strong and tender interest which would naturally cling to the object of their hopes, their cares, and their toils, for which they had sacrificed all earthly things, and in which they found a rest and a refuge for themselves and their church.

The honor of New England was so dear to them, that they could not bear to have her in the least degree blamed

or despised. In their greatest distress, when they were forced to send agents to England to procure assistance, they instructed them "to make use of any opportunity which God should offer for the good of the country;" but they added, with jealous caution, "that they should not seek supplies by any dishonorable means, as by begging or the like."

Such were the motives and such the patriotism of the men who laid the foundation of the institutions under which we now live.

What those institutions originally were, and what were the principles which gave them birth, we will now proceed to consider.

In most of the charters which were granted either to individuals or to companies for the purpose of peopling this country, the government of the respective colonies was retained in the hands of the proprietors in England. They were to frame institutions and make laws for people of whose situation and circumstances they were ignorant, and of whose wants they were consequently unfitted to judge.

This arrangement had existed in the great Plymouth Company; and, as might have been foreseen, it had damped the spirit of emigration, and produced other injurious effects.

When, therefore, in July, 1629, Johnson, Winthrop, Dudley, and others of good figure and estate, proposed to the Company to embark with their families for America, it was on condition that the patent and charter should go with them.

Their proposal was accepted, and on the twenty-ninth of August "it was determined by the general consent of the Company that the government and patent should be settled in New England."

The Governor and Assistants were elected by the freemen before leaving England, and for several years after their arrival in this country the whole body of freemen continued to meet together for the transaction of business.

They were, however, a part of the same body of men from which Hampden and Sydney soon after sprang, and they came here with all the English ideas of the right of representation. Accordingly, we find that in 1634 twenty-four of the principal inhabitants appeared as the representatives of the body of freemen, though this step was certainly unwarranted by their charter.

They proceeded to draw up what may be considered a bill of rights, or in some measure a constitution, in which among other things they declared:—

That none but the General Court had power to make and establish laws, to elect and appoint officers, to remove such upon misdemeanor, or to set out the duties and power of those officers.

That none but the General Court has power to raise moneys or taxes, and to dispose of lands, viz. to give and confirm proprietaries.

That there shall be four Courts yearly, to be summoned by the Governor, and not to be dissolved without the consent of the major part of the Court.

That such persons as shall be hereafter deputed by the freemen of the several plantations to deal in their behalf in the affairs of the Commonwealth shall have the full power and voice of the said freemen derived to them for the making and establishing laws, &c., and to deal in all other affairs of the Commonwealth wherein the freemen have to do, the matter of the election of magistrates and other officers alone excepted, wherein every freeman is to give his own voice.<sup>1</sup>

Such were the first provisions for political liberty which our ancestors made, and no one can read them without recognizing the principal features of our own government at the present day. There is the same careful distinction between the executive and the legislative branches of the government, the same reference to the body of the people as the original source of all power; and there is a strong

<sup>1</sup> Massachusetts Records.

and distinct assertion of the unalienable right of freemen to tax themselves,—a principle to which their descendants have clung with unyielding tenacity, and which lies at the foundation of much which is valuable in the State constitutions of New England at the present day.

In making these provisions, however, they departed from their charter, which did not recognize the right of representation; and since the body which formed this constitution—if I may so call it—had no legal existence, according to the principles of the English law, the constitution itself and all acts done under it were at least voidable, if not *ipso facto* void.

They must have been acquainted with this principle; for we cannot suppose so good a lawyer as Winthrop ignorant of it, or careless of its application.

We must look for an explanation to the political creed which was very generally adopted by all classes in the community.

They distinguished civil subjection into necessary and voluntary. The former arose from residence, the latter from compact.

They rejected the doctrine of indefeasible allegiance, maintaining that any man had a right to leave his country at any time, unless he thereby weakened it or exposed it to danger.

They considered themselves bound to purchase, and they actually did purchase<sup>1</sup> of the Indian princes who claimed the country, the soil and jurisdiction of the territory where they resided.

This freed them from the subjection to the native chiefs, which would otherwise have arisen from residence within their territories.

<sup>1</sup> Mr. Josias Winslow, Governor of Plymouth, in a letter dated "1st May, 1676," says, "I think I can truly say that before these present troubles broke out, the English did not possess one foot of land in this colony but what was fairly obtained by honest purchase of the Indian proprietors." Many other authorities to this point might be given.

The King of England indeed had granted the lands to some of his subjects, and in order to a quiet possession they purchased this claim of the grantees. He had also given them a charter, by which they had entered into a compact with the king, the conditions of which they felt bound to observe. So far they owed him allegiance, but no farther.

By this compact, they were not at liberty to subject themselves to or seek protection from any foreign prince; they were to pay a sixth part of the product of all gold and silver mines; they were not to make any laws repugnant to the laws of England; but, when they had complied with these conditions, they felt at liberty to govern themselves as might be most agreeable to their own tempers and most for their own advantage.<sup>1</sup>

This was in effect saying to the King of England, We have yielded to you certain of our rights: all others remain to us.

His answer would have been, We have granted to you in your charter certain privileges: we cannot resume them as long as they are properly used; but you have already abused that charter by usurping other powers which it does not contain. And when, in 1686, a *quo warranto* was issued against the charter of Massachusetts, if that State had appeared to plead to the writ, this answer would doubtless have been sufficient. But, however inconsistent this theory may be with the principles of the English law, it is certainly quite reasonable in itself, and was very ingeniously adapted to their own situation.

Let no one say they were unwise in acting upon it. For though their success in framing and administering a government on this plan depended upon circumstances beyond their control, and though the English government was prevented from visiting their encroachment on the prerogative with severe and speedy punishment only by having too many troubles and distractions at home to attend to the

<sup>1</sup> Hutchinson, vol. i. p. 250; Winthrop, *passim*.

misconduct of the colonies, still we owe them no small thanks that, at this most important period of the first formation of their government, they asserted their rights with a degree of boldness nearly equal, if we consider their circumstances, to that of their descendants in later times.

It is true they thus eventually lost their charter, but they did not lose it till the people had learned what self-government was, and how to exercise it; till habits of thought had been formed and ideas of political liberty disseminated, which, so far as New England was concerned, were the great causes of the American Revolution.

Neither was it abandoned without a struggle; for, though they were so weak as to be harmless as doves, they were certainly wise as serpents. Far-famed as their descendants are for their shrewdness, I doubt whether they ever displayed that quality in greater perfection than was exhibited by their ancestors in escaping the acts of trade and negotiating concerning the charter.<sup>1</sup> And when that charter was at last taken away; when the royal governor came, and with him came taxes of all descriptions, from the petty exactions of his inferior agents up to his own severe impositions; when the titles to their lands were questioned and set aside; when, in short, to use the words of their active enemy, Randolph, "they were ruled as though they had

<sup>1</sup> It is indeed surprising that not only were the English Government ignorant of their real situation, but were unable to obtain any satisfactory information. We find in that very curious book, "The Diary of John Evelyn," some notices of the opinions and knowledge of the English Government concerning this country. He was at one period of his life a member of the colonial council, and under the date of May 26, 1671, we find the following: "What the council most insisted on was to know the condition of New England, which appearing to be very independent in their regard to Old England or his Majesty, rich and powerful as they now were, there were great debates in what style to write to them; for the condition of that colony was such, that they were able to break with all the other plantations about them, and there was fear of their breaking from all dependence on this nation. His Majesty, therefore, commended this affair more expressly. We thought fit to acquaint ourselves, as well as we could, of the state of that place, by some whom we heard of, that were newly come from thence,

been subjects of the Grand Turk,"— it was but teaching them by the force of contrast the value of their former quiet and happy government.

They felt the force of the comparison. They learned the lesson thoroughly.

No sooner was it rumored in America that William had landed in England, than, without waiting for news of his success, without knowing that they would not thus bring down the royal vengeance on their heads, there was a rush of popular feeling, and the royal authority was borne down by its power in a single day.

It was a sudden and rash revolution, but it was unaccompanied by cruelty or bloodshed, and serves well to show with what reluctance the popular government was resigned, and with what a spring they returned to it on the first opportunity.

I have thus far endeavored to present a few of the general principles which guided our ancestors in the formation of their government, and to point out some of the effects of this early popular government.

We will now proceed to consider one of their civil institutions, which, whether we look at its immediate or its remote effects, is of great importance.

I refer to the confederation of New England in 1643.

The wise men who were at the head of the different gov-

and to be informed of their present posture and condition. Some of our council were for sending them a menacing letter, which those who better understood the peevish and touchy humor of that colony were utterly against." Vol. i. p. 438.

After this, viz. under the 3d of August of the same year, is the following entry : "A full appearance of the council. The matter in debate was, whether we should send a deputy to New England, requiring them of the Massachusetts to restore such to their limits and respective possessions, as had petitioned the council. This to be the open commission, but in truth with secret instructions to inform the council of the condition of these colonies, and whether they were of such power as to be able to resist his Majesty, and declare for themselves, as independent of the crown, which we were told, and which of late years made them refractory." Vol. i. p. 441.

eriments of New England early felt the value and even the necessity of union. They perceived that several independent States were growing up side by side, united in some degree by having a common origin, and by the similarity of their habits and feelings and institutions, but likely to differ in after times, when they might no longer possess a community of feeling and interest.

There was one subject on which at this period they felt alike, and felt strongly. They had a common enemy, and it was avowedly for the purpose of opposing this enemy that the league was formed. Undoubtedly, this was its principal object; but I do not think it was the only one.

For, while the articles of confederation were so drawn as to preserve the distinct and separate jurisdiction of each colony, powers were given to the assembled delegates "to establish laws and rules of a civil nature, and of general concern for the conduct of the inhabitants," viz. relative to their "behavior towards the Indians, to fugitives from one colony to another, and the like;" and it was also provided "that if any colony break any article of the agreement, or in any way injure another colony, the matter shall be considered and determined by the commissioners of the other colonies."

These provisions were certainly sufficiently extensive to embrace all the sources from which difficulties and disputes might arise, and the immediate benefits which they conferred on the colonies were important.

It is true they had provided no means by which the award of the commissioners could be enforced; it is true also that Massachusetts did once or twice take advantage of her superior power to be ungenerous and even unjust: but still I cannot allow that the league was a dead letter, because its terms could not be enforced at the point of the sword. In the controversy between Massachusetts and Connecticut relative to the fort at Saybrook, and the imposition of duties on the colonies by Massachusetts, we find the delegation making use of the following language:

"The commissioners recommend it to the General Court of Massachusetts, seriously to consider whether such proceedings agree with the law of love and the tenor and import of the articles of the confederation."

This appeal was effectual. Let us not say, then, that the decisions of the delegates were not respected, and that the union was of no avail.

It is not on account of its immediate effects, however, that it has been here introduced. It is because this was the first experiment of the kind ever made in this country. It is because this was the first public measure ever taken to unite New England into a phalanx which has never since been broken. It is because this early union did much to preserve and increase an habitual and close intercourse between the inhabitants of the separate States, and to give them a similarity of character and feeling. It is because, when the dark hour of the Revolution came, it found them familiar with the idea of acting in concert, and ready to avail themselves of all the advantages which must result from unity of thought and action.

It has already been remarked that the enjoyment of religious privileges was the grand object which brought our ancestors to this country. They left Old England that they might worship God in their own way, in conformity with their ideas of what the Scriptures taught.

To one who has been educated in the bosom of an Established Church, and who feels in its founders and supporters a degree of confidence which will allow him to turn to them for guidance when his own light fails him and he feels that he is treading on unknown and dangerous ground, it must seem the extremity of rashness and presumption for a body of men to cut away the ties which connect them with such a Church, and, rejecting all other guidance but that of their own reason, to set out to explore the dim and boundless field which revelation has opened.

To such an one it must appear that these daring men were

about to launch on a dark and dangerous sea, without compass to guide or anchor to keep them firm; not even knowing to what haven they wished to direct their course. Not so did it appear to the first settlers of New England. They turned their backs on all human authority, and, saying that the Bible was the only rule for Protestants, they doubted not that in that Bible they had discovered a true and perfect rule of faith.

It may at first sight seem surprising that such a perfect conformity should have prevailed in the churches of New England for the first fifty years after the settlement of the country.

The vast number of sects into which Christendom is at this moment divided proves that the Bible is susceptible of a great variety of interpretations. Yet here were many thousands whose minds were differently constituted, who had enjoyed unequal advantages for cultivation, but who still arrived at the same result. Can we believe that they were guided solely, or even principally, by their own reason? In order to answer this question, we will turn to the examination of their religious creed, of the alterations which have taken place in that creed, of the effect which it produced on their private character, and through them on the New England character of the present day.

The religious creed of the first settlers of New England seems to have differed in some respects from all other creeds.

Unlike the Catholics and Episcopalian, they acknowledged no head of the Church but Christ. Unlike the Presbyterians, they recognized no ecclesiastical jurisdiction extrinsic to a particular assembly of Christians in one place, to which they gave the name of "*a church*," to which such a church was subject, and by which it could be censured. And though they approached nearer perhaps to the Independents of the time of the Commonwealth in England than to any other sect, still they did allow the right of the magistrates to interfere in ecclesiastical affairs.

"Every church," says Lechford, "has power of government in and by itself, and no church or officer has power over one another, but by way of council, *saving that the General Court do now and then overrule some church matters.*"

However inconsistent it may appear with the professed ecclesiastical constitution, and the freedom of every church to govern itself, examples of the interference of the General Court, and of their "overruling church matters," may be found in many parts of their early history.

In 1653, they imposed a heavy fine on the church at Malden for choosing a minister without the consent and approbation of the neighboring clergy and the allowance of the magistrates; and soon after they restrained the North Church in Boston from electing one pastor, and even went so far as to recommend to them another. About the year 1650, Mr. Mathews, a minister, was fined £10 for preaching to a church which had been gathered without the consent of the magistrates.

On the other hand, we find numerous instances of the interference of the clergy in civil affairs,—of interference, too, so direct, and often so unwarranted, as to be a little complained of even by a man like Winthrop; so that it does not appear to me that there was as complete a union of Church and State in Massachusetts, for instance, under her first charter, as has ever existed in England at any period since the Conquest.

In the first place, they cut off all but those of their own communion from civil offices. None but freemen were allowed to vote, and none were freemen who were not church members. Let us look a little farther, and see how church members were made.

They were first examined by the elders, and then propounded by them to the brethren for their vote. Upon the elders, then, it chiefly depended who should be admitted to, and who should be excluded from, the privileges of freemen.

They had thus the keys both of Church and State pretty effectually in their own hands.

We have thus seen how great and direct an influence the elders of the Church had in civil affairs : we will now look for a moment at the power of the magistrates over the Church.

In chapter 17, sec. 3, of the Cambridge Platform, it is declared that “the power and authority of magistrates is not for the restraining of the Church, or for the restraining of any other good work, but for the helping on and furthering thereof.” But who is to decide what is the helping on of a church, and who is to pronounce what is a good work which is not to be restrained? Who but the magistrates themselves? They are judges both of what the power is and when it is to be exercised. With them it is deposited, to be used whenever they choose to say there is an occasion for it.

But, says one of the principal divines of that day, “the gospel of Christ has a right paramount to every other right in the world : what is contrary to the gospel hath no right, and therefore should have no liberty.” But who is to say what is contrary to the gospel? Is it the magistrate? Then are the magistrate’s ideas of what the gospel teaches the rule by which the Church must be governed, and the rule by which all must walk.

If this is not, on the one hand, an assumption of power over the Church equal, at least, to what has, in any instance, been assumed by a King of England ; and, on the other, an encroachment on the civil government by the clergy, as great as has ever been made by any hierarchy, then am I ignorant of that portion of history in which such assumption or encroachment lies.

I have not been led into these remarks by a desire to detract from the good name of our ancestors, or to point out faults in their government. On the contrary, I believe that it was the wisest plan of government which, under their circumstances and in their condition, could have been adopted.

And though I do most sincerely lament that they carried their theory so strictly into practice as actually to allow to "those who walked contrary to the gospel no liberty and no right," not even personal freedom and safety, but persecuted them even unto death; still, the constant and rapid advancement of the country, and its freedom from internal dissensions, prove, notwithstanding all arguments to the contrary, the wisdom and success of their plan of government. It was perfectly consistent with the character of the people. It grew out of that character, and was modified by the popular habits and modes of thought.

I have no intention, therefore, in what I have said of impeaching the general wisdom or integrity of the magistrates, the clergy, or the people. My object is to show that, during the first fifty years after the settlement of this country, there was an Established Church to all practical intents and purposes. My remarks do not apply to Rhode Island and Providence Plantations; for, during the period of which I am speaking, they did not form a part of New England. They were not admitted into the confederation of 1643, and were looked on with a jealous eye by Massachusetts, Connecticut, New Haven, and Plymouth. When I speak of New England, therefore, at this period, I would be understood to refer only to these latter colonies.

We find, then, that the perfect toleration which now prevails is essentially a new experiment. It becomes, therefore, an interesting question to ascertain what effects have already followed, and what are likely to result from it in future.

Our limits will not permit us to discuss this question, except so far as the change which has taken place has modified the religious character of New England.

Whatever may be the merits of a religious system, its effects upon the mass of mankind must depend in an important degree upon its teachers.

All instruction and all truth, except simple mathematical

truth, is modified by the medium through which it is conveyed. And since the Christian religion is so perfectly adapted to the nature of man; since it is something about which we not only reason, but hope and fear, love and hate,—it is far more likely than any other truth to take the hue of the mind through which it passes.

In examining the religious character of a people, therefore, it is necessary to ascertain the claims of its clergy to pure morals and cultivated minds.

The early clergy of New England may boldly challenge this examination.

In 1638 there were, in Massachusetts and Connecticut alone, fifty graduates of Cambridge University in England, besides not a few who had received degrees at Oxford; so that there was one person out of every two hundred who had received as good an education as could be furnished in England, at a time when a reformation had just taken place both in philosophy and religion, and the minds of men were everywhere awakened by the great discoveries which had already been made, and were kept in a state of stir and excitement by the expectation of other and greater changes.

Of these graduates, the whole number, with but few exceptions, were ministers.

Whatever, then, may have been the faults of the New England ministry, none sprung from the want of a strict and thorough education, or were generated by the impurities of a corrupt and immoral life.

So far as the human learning of the period could aid them, so far as the labors of past generations had formed a stepping-stone to something higher, they were prepared to avail themselves of its assistance. And if there is indeed a connection between good morals and intellectual activity, between a pure head and a clear head, then did they possess the power of applying their learning practically and skilfully to the great objects of their profession,—the improvement of men in knowledge and virtue.

Let us now call to mind that the people whom this ministry were to guide and instruct had proved their attachment to religion by coming to this country ; and that now, after they had begun to obtain a comfortable subsistence here, they were not likely to harden themselves against the influence of a body of zealous, learned, and pious men, or to listen with cool indifference to their instructions and exhortations. The recollections of the persecution which they had undergone in England, and of the want and suffering which they had experienced here, were too recent and too strong to allow them to forget the sacrifices they had made for their religious principles, or to be indifferent about availing themselves of privileges purchased at such a price.

We accordingly find that the moral influence of the ministry was very great.

Unaided by their peculiar form of church government, the strong religious feelings of our ancestors would have presented to an able and zealous minister ample means of attaining power.

But when you place such a minister at the head of a church, when we remember that this church thought it so incumbent upon them to preserve the strictest moral purity in its members that every man in the community was in fact a spy upon all the rest, and that for the smallest and most venial faults and for the most atrocious crimes men were brought before this church to be judged, — this able and zealous minister acting as grand inquisitor at the trials, — we perceive at once that their power over the minds of their flock must have been almost unbounded.

It cannot be denied that such a system did tend to make hypocrites.

Religion may become a fashion as well as any thing else ; and, when it does become so, it has as little to do, in those who thus hold it, with the heart and the character as any other fashion.

But while I believe that there were some at that day who

concealed an impure heart and a wicked life under a solemn exterior, I believe also that the great majority thought and felt as they acted and professed; and no one can hesitate concerning the religious character of two communities, through one of which vice stalks in open day, while in the other it is forced to conceal itself under the semblance of virtue.

The famous Hugh Peters, who was at one period of his life in Boston, testified before a committee of the Long Parliament that while he was in America he had never seen a single man intoxicated or heard a single oath sworn. The most stern and unbending integrity, the most rigid strictness not only in affairs of moment but in the merest trifles, were the only passports to respectability and influence; and though we do not pretend to say that vices did not exist, since we have accounts of their punishment, still we do know that they were very rare, and that when they did exist they were almost necessarily discovered, and when discovered were certainly and severely punished.

Let us now compare this state of society with the character of the New England people at the present day, and we shall at once perceive in what they differ and from whence these discrepancies have arisen.

The connection between the civil and ecclesiastical government is abolished. The careful supervision of the Church over the morals of its members, though not totally done away, is greatly relaxed; and we are not compelled to prize our religious privileges, or to avail ourselves of them with eagerness, by having suffered in their cause.

Since we are not called upon as a people to defend those privileges, religion has become less a matter of public concern. It is something between God and each man's own conscience, and not between each man's conscience and the government.

Moreover, the civil disabilities which were formally imposed upon those who were not church members are now

removed, and no one is compelled to submit his morals and his conduct to the mild jurisdiction of a New England church of the present day.

From each and all of these causes, it is to be feared that the strong and conscientious attachment which our ancestors felt for the sober truths of our religion has been weakened in their descendants; that an increase of blessings has not brought an increase of gratitude; and that, though we stand on higher ground and our view is wider and clearer than theirs, we do not look so steadfastly upon the best and brightest of all lights, the light of revelation.

I am not about to descant on the vices and the degeneracy of the present age. I have no wish to declaim about this or any subject. There are few men capable of talking coolly and sensibly on the character of their own age, and those few possess qualities to which I make no pretensions.

But when we are told by one whose veracity we cannot question that in early times there was a great training in Boston, at which troops from all parts of the country were present; that they were supplied with wine at the public expense, and yet there was no quarrelling, no swearing, no drunkenness: and if we then call to mind similar scenes at which we have been present, where those who had assumed the garb of soldiers seemed to have put on with it the nature of brutes,—we must allow that there has been a change in the character of the New England people, for which an increase of riches and population will hardly account.

Far be it from me to question the influence and character of our clergy at the present day. In learning and ability, they are most of them equal to those of an earlier period.

A liberal and far-searching spirit of criticism gives them a great advantage over their predecessors; and, if they do not surpass them in purity of morals and holiness of life, it is only because they were as near perfection as men can attain.

Neither do I doubt the utility of the changes which have taken place in our civil constitution, or the expediency and even necessity of leaving to our countrymen greater liberty of thought and action than they once possessed ; a liberty which like all other power may be, and in some instances always will be, abused for evil as well as used for good purposes.

It is a very general opinion that our clergy are at this moment making efforts to recover some portion of that power which they have allowed to escape from their hands ; and, conscientious as those efforts may be, I should be sorry to see them succeed. But still I do believe that from the influence of the old New England clergy came that strict puritanical morality which entered so intimately into the character of our ancestors, and some portion of which, I thank God, their descendants do still retain.

But the fashion has changed. Men have found out that there is no necessary connection between a good character and a grave face, and they are so anxious to throw off the one, that it is to be feared some of the other may go with it. They smile at the ignorance and credulity of their fathers in supposing it sinful to drink healths ; and in the words of an old Puritan, "While they drink to the health of others, they not seldom ruin their own." They talk scientifically about the bad policy of imposing sumptuary laws, and they sacrifice no small part of their comfort and happiness to show and fashion.

I do not believe this is as it should be. The valuable parts of the New England character are not of modern growth, but have come down to us from the early settlers of the country. It is to their wonderful foresight, their unbending integrity, their cool courage ; their spirit of enterprise, which no obstacles could check, no defeat subdue ; their power of adapting themselves to all situations, of taking advantage of all circumstances,—in short, it is to their genuinely shrewd Yankee spirit that we must look as to

the causes which produced, and have ever supported, our institutions ; and these qualities have descended regularly down from father to son, to the present day.

It is perfectly obvious that this character greatly needs some strong, controlling principle to direct and govern it ; and it is as obvious that religious principle is the only effectual means of attaining this end. Are we not in danger of losing not the active, but the restraining principles of the New England character by the reaction which is now taking place, which shows itself in what is called the liberal spirit of the present day ? There is little danger that our countrymen will become sluggards,—that they will lose that daring and restless spirit of enterprise which, whether on the land or on the sea, has ever been their great characteristic ; but is it not to be feared that this energy of character will be guided by an all-absorbing selfishness, unrestrained by fixed and generous principles ? Granting, then, that our ancestors were in some things weak and ignorant, that they had narrow and illiberal ideas of toleration, that they did drown witches and hang heretics, still it is bad policy in us at this day to dwell upon their defects, when the stability and advancement of the New England character depend upon the tenacity with which we cling to the institutions which they founded and the principles by which they governed their lives.

Let us now turn to the literary institutions of New England, and, if I mistake not, we shall find in them greater proofs of foresight, clearer evidence of a knowledge of the future wants and condition of the country, and less that can be objected to on the score of narrow-minded bigotry, than in their civil and religious institutions.

We will consider : first, Common Schools ; second, Colleges : —

I. The first hint which we have of the formation of the common-school system occurs in the records of the town of Boston, where, under the date of the thirteenth of the third

month, 1635, may be found the following entry: "That our brother, Philemon Pormont, shall be entreated to become schoolmaster for the teaching and nurturing of children with us;" and thirty acres of land are set off as a compensation.

It should be remembered that this was but five years after the first settlers had established themselves on the peninsula which is now covered by the city of Boston, but which was then little better than a wilderness; while they were dependent on their native country for their supplies of food, and while the savages were everywhere around and among them, and each man depended for his personal safety upon his arms and his vigilance.

In 1647, the General Court enacted that in each town a school should be kept, where reading and writing should be taught; and that every town of one hundred families should maintain a school in which boys could be prepared for the College. Like provisions were made in Connecticut and New Hampshire in 1656 and 1672.

No less wisdom was shown in carrying this plan into execution than in devising it. The necessary funds were raised by a tax upon property; and thus the benefit of instruction was extended to all classes in the community, the rich being made to pay for the education of the poor,—certainly for the benefit of the poor, whose means would not allow them to obtain instruction for their children; and equally for the benefit of the rich, since nothing can give greater security and value to property than the certainty of its being in the midst of an intelligent, quiet, and orderly population. This, therefore, is a tax which the rich man will gladly pay; for it secures him against the evil of being surrounded by a rude and disorderly multitude, who render his property less secure and the enjoyment of it less valuable. Moreover, the funds were to be raised by a tax, laid by the inhabitants of each town on themselves; and the money was in this way expended, and the benefit of it received, on the spot where it was raised. This was a wise provision; for the parents

are far more likely to send their children to school and to procure good masters, and in short to get their money's worth, when that money is taken directly from their own pockets, and applied by themselves under their own direction to the education of their own children.

All departures from this system in later times have proved evils, and have shown the correctness and wisdom of the plan devised by our forefathers.

To a New England man, it is unnecessary to say a word about the success of this system; to those who have not had the benefit of experience on the subject, we need only say, Come and see.

On this common-school system the New England character is mainly based; and connected as it is, in a thousand ways, with the religious institutions and principles of our ancestors, it is undoubtedly the greatest blessing which they have conferred upon their descendants. It places within every man's reach the means of knowing his duty and great incitements to performing it; and the number of men who are at this day in the highest rank among our citizens, who, had it not been for common schools, must have remained in ignorance and obscurity, furnish good proof of the benefits of the system. We do not look to them as the only or even the best proof of its utility. We find it in an active population, whose energies are well directed. We find it in the desire which is so strong and manifest in all, to give their children a better education than they themselves enjoyed. We find it in the respect which talents and acquirements everywhere command. And we ask for no better or higher proof that the common-school system enters into the whole character of the New England population, and does not a little to distinguish it from every other population in the world.

II. In 1636, in the midst of the Pequot war and the Antinomian controversy, our ancestors laid the foundation of the first New England college. It dates only from 1638,

because the college was in that year endowed with a considerable sum by the will of Mr. John Harvard, but in fact the General Court had made an appropriation for it two years before.

It owes its existence to the same foresight, the same desire to provide for the future wants of the country, at whatever present cost to themselves, which had already laid the foundation, and shortly after perfected the system, of common schools.

It is not too much to affirm that they looked forward to the future independence of New England and the existence of a republican government; and they knew that the only safety for a republic was to be found in the careful education of its citizens. They knew that the bane of all governments was the narrow-minded selfishness which ignorance so necessarily produces; and, in founding and supporting this institution, they left to their descendants a noble example of a generous and self-sacrificing spirit.

From their earliest date down to the present day, the New England colleges have continued to send forth, from year to year, men who have filled the different learned professions with equal honor to themselves and benefit to the community; and, though we naturally look first at the statesmen who have taken the lead in the great affairs of the country, we must not disregard the great number of men whom the colleges of New England have produced, who carry with them into a narrow circle and into the everyday business of life clear and high-minded views, by whom the most important truths are disseminated among the people, and from whom the people learn the value of education and are led to desire it for their children.

We have thus taken a rapid view of those civil, religious, and literary institutions whose effects are most perceptible at this day in the New England character. We find that character to be one of great energy, and consequently in need of strong restraining principles. We find that the first

settlers of New England have furnished us with ample stores from whence those principles may be drawn, and that we have only to support and improve the institutions which they founded, and we may be assured that the New England character, however modified by time and circumstances, will remain essentially the same ; that the industry, the morality, and the intelligence which have caused the country to advance with so rapid a step, will ever insure its progress ; and that we may thus leave to our descendants the same and even greater blessings than our fathers bequeathed to us.

In conclusion, may I be permitted to express my regret that no one has yet undertaken a regular philosophical history of New England. The field has been well wrought in detached portions by individuals whose industry and skill cannot be too much praised. Would that we had an entire history of the country from an able pen. For richness and variety of materials ; for the number of events from which important consequences have followed, and which developed as they occurred strongly marked and highly interesting characters ; for connection and unity of plan ; for the clear light in which every part lies unshaded by time, undisturbed by prejudice, — there are few periods of two hundred years in the history of any country which can compare with the history of New England.

[A Bowdoin Prize of fifty dollars was awarded in August, 1830, to Benjamin R. Curtis for the foregoing dissertation.]

AN ADDRESS DELIVERED AT DEERFIELD,  
MASS.,

FEBRUARY 22, 1832,

BEING THE CENTENNIAL ANNIVERSARY OF THE BIRTHDAY OF  
WASHINGTON.

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FRIENDS AND FELLOW-CITIZENS:

THE occasion on which we are here assembled is one of no inconsiderable interest. One hundred years have elapsed since the birth of him whose most familiar name to us is the Father of his Country, and we are here to commemorate that event. Living and acting men on the earth from which he has now gone; citizens of the country which he so faithfully served, in the enjoyment of the blessings which he so greatly contributed to procure for us,—we have laid aside the interests and occupations of our daily lives, and come here to offer a tribute of respect to his memory.

In what form shall we make this offering? His actions and character are familiar to every child throughout our wide land, and every form of eulogy has been exhausted on his name. In the hearts of his countrymen he has found a fit and enduring home, and all praise which my feeble tongue could give him would sound but faintly on your ears.

I trust, therefore, that you will not deem it inappropriate to the present occasion if, instead of speaking directly of Washington, I endeavor to trace an outline of the origin and history of the principles of government, in the assertion and development and practical application of which Wash-

ington had so distinguished a part, since we can in no better way show our respect for the memory of him who owes to his connection with these principles the warm affection with which his countrymen have ever regarded him, as well as the distinguished place which he holds on the page of history.

It would seem, too, to be a fit hour for historical recollections. We all do know how many associations cluster around particular times and seasons in our individual lives, and how naturally our thoughts are led back over the past, when the anniversary of one of those periods is brought round to us by the passage of time; we do know also that instruction may be gained by such a recurrence to the past.

What is true in this respect of our individual existence is true, in as high and important a sense, of our existence as a people. The days of one man's years on earth are short and few; our eyes have not seen the forms, nor our ears heard the voices, of the generations which preceded us: but still there is no isolation, no independence. Their arts and sciences, their government, the treasures of learning and wisdom accumulated by their experience and labor,—nay, all which they did and thought and suffered here,—bind us to them by ties whose number and strength no human mind can estimate, and which no human arm can break. The same ties bind us to the generations which are coming, and unite us into a people which does not die; whose existence is as real, and its different parts and periods as dependent on each other, as the life of an individual. And, now that a century has passed away since an event of importance in our existence as a people,—a century which is to a great people like a single year in the life of man,—it is right for us to go back to the past. The historical recollections of some nations may be little worth preserving: they may disclose only dark and unsightly pictures of violence and disorder and ignorance and slavery and crime; but ours are of immense importance to us. They not only contain bright

examples of human excellence and instructive lessons to guide us in difficulty and danger, but they cherish our national spirit, they infuse into our hearts an attachment to our common countrymen, they uphold that union which is our strength, they make us understand and feel *the spirit* of our institutions, and that the precious rights which we have inherited do not belong to us as individuals, but as component parts of a great people; and it is our sacred duty, at all fit times and all proper ways, to cherish these recollections.

With these views of the occasion and the ideas naturally connected with it, I would, as I have said, endeavor to trace an outline of the origin and history, so far as it concerns us, of the principles of government with which the distinguished individual whose birthday we commemorate was so intimately connected.

We naturally look for these principles to the colonists by whom North America was originally settled; but as these colonies were planted at various times, undertaken from different motives, and composed of bodies of men whose general characters were dissimilar, we must be careful not to confound them, and, because we find certain modes of thought and feeling—common characteristics of all the colonies—at the commencement of the Revolution, conclude that each brought them from the mother country, or that they grew up simultaneously among them after their arrival here.

The first attempts to colonize our country were made in the reign of Elizabeth,—a period when the same causes which produced the crowd of distinguished men whose names adorn this brightest period of English history were felt throughout the whole body of the people, and produced an energy and an excitement which were not to be worked off in the old and tried fields of exertion.

The age of knight-errantry had passed away; but there still remained no small number of men who were burning with

the love of romantic adventure, and who were ever ready to bring courage and energy and zeal to any undertaking which promised to gratify their restless love of enterprise and glory. The study of the Spanish language and literature, which had become common among the higher classes, naturally turned their thoughts to America, which seemed to open a boundless field for the acquisition of wealth and fame. At the head of this class of men stands that splendid but unfortunate gentleman, Sir Walter Raleigh. But the charters which they obtained from the Crown not only betray a gross ignorance of the wants of a colony, but an entire disregard of political liberty, and compel us to acknowledge that, high-spirited and chivalrous as they were, it is not among them we can look for the origin of the principles which lie at the foundation of our present government.

It is not singular that we are unable to find in the charters of these early adventurers a jealous care for their liberties. The Queen by whom they were granted, the purposes for which they were obtained, as well as the characters of these early Southern colonists, sufficiently account for the fact; for Elizabeth was excessively jealous of her prerogative, the objects of the colonists were wealth and adventure rather than a permanent settlement, and although a part of the English nation had at this period begun to think of their rights, and of the means of regaining and preserving them, these colonists were not among that number.

It is to that part of the English people who were at that time awakening to a perception of their rights that I would now request your attention.

There has been much dispute relative to the formation of the English Constitution, and the existence of its particular parts at different periods. On whichever side the truth may lie, it appears to me certain that the body of the people never entirely lost sight of the rights and liberties which they had enjoyed in ancient times.

The first Magna Charta extorted from John was but a

confirmation of a more ancient one of Henry I.; and this, too, was in affirmance of the ancient standing laws of the land, as they had existed among the Saxons ere the power of the Norman chivalry, combined with the subtlety of the Norman lawyers, had deprived the Saxons — who then formed, and whose descendants still form, the mass of the English nation — of their ancient civil and political institutions.

In the famous Law of the 3d Charles I., the Parliament say to the King, “*We have inherited this freedom;*” and the same idea is expressed in all the laws which since that period have been framed for the preservation of their liberties. Thus, in the 1st William and Mary, in the celebrated statute called the Declaration of Rights, they declare “that all and singular the rights and liberties asserted and declared are the true *ancient* and indubitable rights and liberties of this kingdom.” They claimed them,—as they had always claimed them,—not as new privileges, which they had the power to extort from their sovereign, but as an inheritance which had descended to them from their fathers. From the time of the Norman Conqueror, when the popular cry was, Give us back the laws of the good King Edward, down to the Revolution of 1688, this feeling of hereditary right never entirely left the hearts of the English nation.

With such a feeling existing in the body of the people, there was always hope for their liberties. It might be downcast for a time, but it was easily awakened. No cause could operate on the people so as greatly to excite and animate them, without a chance of rousing it. Least of all could such a cause as the Reformation fail of producing this effect.

Few single events have occurred in the history of the human race, the consequences of which, both immediate and remote, have been of such importance as those which followed the attack of Luther on the Romish Church.

In England, even long previous to the appearance of Luther, a sect had existed who had separated themselves

from the Catholic Church, and attained to considerable light on the subject of religion. This sect was not very numerous nor very powerful; but some of them had suffered for their opinions under the House of Lancaster, and their sufferings, together with their great activity and their unbounded zeal, had kept the public mind in some measure awake, and prepared it for the great events which were to follow. And when the light of the Reformation at last broke upon the world; when that light was turned upon England by that good Providence which often renders even the vices and crimes of rulers instrumental to the general good of their subjects; when, too, that most detestable and brutal tyrant who ever disgraced the English throne attempted to shut it out from their eyes, and trampled on their religious and political rights together,—it cannot be supposed that the memory of the liberties wherewith their fathers had been free was absent from their minds, or that their hearts were cold at the thought of regaining them.

Here is the foundation and origin of that sect to which England, as well as we ourselves, owe so much: I mean the Puritans. They had been long prepared to reject the supremacy of the Pope, but they were quite as desirous to be free from the supremacy of the king, who was always at heart a Catholic, and who tolerated the Reformation only because he found it convenient to be pope himself. The persecution which they endured from him and his daughter Mary scattered the most eminent of their number on the Continent; and when, at the accession of Elizabeth, they returned to England, their sufferings and their intercourse with the reformers on the Continent had infused a republican spirit even into their religious doctrines, which was ill calculated to please that haughty Queen.

It has been doubted whether their system of religious opinions, or any received system of religious opinions, has a necessary connection with civil liberty. We are told that popery existed in the free Italian States of the Middle Ages,

and that Presbyterianism has long harmonized with monarchy in Scotland.

But they who entertain this doubt can have been little conversant with the opinions of the sect of the Independents in the time of the Commonwealth in England, or with the genius and character of Congregationalism in our own country.

They must be blind to undeniable facts of history, as well as to the great deduction from those facts,—that, among a people who read and understand the sacred Scriptures, religious and political liberty will not be separated.

I do not mean to advance an idea, which has sometimes been contended for, that the Scriptures inculcate a particular form or particular principles of government. This was not any part of their object or design. It could not be: for, as they were intended for all nations and tongues and people, to say that they do this would involve the absurdity that they inculcate the same form of government for the Russian and the Englishman, for the subjects of the Grand Seignior and the citizens of our own Republic; and a greater practical absurdity could not be.

At the same time, it must be allowed that there are passages of Jewish history likely to catch the attention and influence the opinions of men, one of whose faults was a too great readiness to apply those Scriptures which had a local and temporary design to their own affairs; and this fact should not be passed over in estimating the causes which operated on their minds. But the great cause was that a habit of free thought on religious subjects naturally led the Puritans to examine their civil government. Their strong, bold, and active minds soon embraced the whole subject of their rights. The arbitrary power of kings had arrayed itself against their religion, which they valued more than all earthly things; and the consequence of all this was that a deep-seated love of liberty grew up in their bosoms. Not that kind of love for it which evaporates in loud cries or empty

declamation about the rights of men, but a love which was connected with and made a part of their own dignity of character, and with the aspirations after personal improvement and excellence, which they so carefully cherished; and it was as a means and condition of this progress, as essential to the maintenance of an elevated feeling of personal responsibility, which they deeply felt, that they cherished this love.

Unlike the Revolutionists of France, they never dreamed of uprooting the foundations of property, that they might reform the tenure by which property was held; nor of throwing off the restraints of order and law, and thus making the community slaves to the evil passions of its worst members, that they might thereby escape from under the burdens with which regal oppression had loaded them; least of all did it ever enter into their minds to destroy the institutions of religion, and endeavor to root out of the human heart those necessities and desires for it which are inseparable from our nature, in order to plant in their place some brilliant paradox concerning civil society.

The liberty which they loved was consistent with law and order, and virtue and morality, and religion; for it was as a means of attaining and enjoying these that they valued it, and they were too wise to sacrifice the end in order to gain that which was valuable, only as a means of attaining that end. They have been accused of being republicans, and it is an accusation to which we, their descendants, are proud to plead guilty; and we will add, at the same time, that whatever liberty America or England possesses at this day would have hardly existed, if they had not been so.

I do not mean to say that the principles of a free government were entirely unknown to the colonies which were not composed of Puritans; on the contrary, we find in the acts of many of those colonies, soon after their arrival in this country, clear indications that they understood many of those principles. The history of Catholic Maryland is a

bright example; and the laws which were framed by Penn for the government of his colony, as well as the curious political disquisitions of that great but singular man, show that those principles were felt and recognized there.

But I do mean to say that the English Constitution, in the reign of Charles I., had drifted among the same rocks and shoals where the other free constitutions of Europe went down; and that, if it had not been for the Puritans, those little sparks of fire, which were brought over here and laid on the altar of liberty in the wilderness, and which have now kindled a flame which lights the world, would have been trampled out under the foot of arbitrary power; and I do mean to say, further, that the other colonists were not at heart republicans, while the early settlers of New England were.

It is on this account, as well as because their history is more nearly interesting to us, that I shall request your attention, while I endeavor to trace those principles as they showed themselves in the Colony of Massachusetts Bay.

The first settlers of this colony separated themselves from their Puritan brethren at a time when the principles of the sect were the most pure, and their entire character had an energy, a boldness, and a disinterestedness which has never been surpassed; and the nature of their undertaking, as well as the motives which led to it, prove that it was no feeble or valueless part of their number which came here.

It is hardly possible for us, at this day, to estimate the strength of motive and the firmness of purpose necessary to the undertaking and accomplishment of such a design. But they did undertake and accomplish it; and, having done so, they transferred the full strength of their affection from Old England to New. They felt for this infant land, not only common patriotism, but all that strong and tender interest which would naturally cling to the object of their hopes, their cares, and their toils, for which they had sacrificed

every earthly thing, and in which they had found a rest and a refuge for themselves and their Church.

The honor of New England was inexpressibly dear to them. In their greatest distress, when they were forced to send agents to England to procure assistance, they instructed them "to make use of any opportunity which God should offer for the good of the country;" but they added with jealous caution "that they should not seek supplies by any dishonorable means, as by begging or the like."

Such were the character and patriotism of the men who laid the foundation of our political institutions. We will consider some of those institutions and the principles from which they sprang.

In most of the charters which were granted, either to individuals or companies, for the purpose of peopling this country, the government of the respective colonies was retained in the hands of the proprietors in England, under the immediate supervision of the Crown. They were to frame institutions and make laws for people of whose situation and circumstances they were in a great measure ignorant, and of whose wants they were consequently unfitted to judge. This arrangement had existed in the great Plymouth Company, and, as may well be supposed, it had damped the spirit of emigration and produced other injurious effects. When, therefore, in 1629, a body of men of good education and considerable wealth proposed to this Company to embark with their families for America, it was on condition that the patent and charter should go with them. Their proposal was accepted, and, in the language of one of their number, "it was determined by the general consent of the Company that the government and patent should be settled in New England."

There was more in this measure than at first appears; for it freed them from that embarrassing connection with the mother country, which so long prevented the formation of free governments in the other colonies, and which was a

AN ADDRESS DELIVERED AT DEERFIELD, MASS. 49

never-failing source of interference on the part of the Crown.

The Governor and Council were elected by the colonists before they left England; and, for several years after their arrival in this country, the whole body of the people continued to meet together for the transaction of business. They had brought with them, however, all the English ideas of the right of representation; and accordingly, in 1634, twenty-four of their principal men appeared as the representatives of the people, though this step was certainly unwarranted by their charter.

They proceeded to draw up what may be considered a Bill of Rights, in which, among other things, they declare "that none but the General Court has power to make and establish laws, to elect and appoint officers, to remove such upon misdemeanor, and to set out the duties and powers of those officers. That none but the General Court has power to raise moneys or taxes. That there shall be four courts yearly, to be summoned by the Governor, but not to be dissolved without the consent of the major part of the court. That such persons as shall be hereafter deputed by the freemen of the several plantations to deal in their behalf in the affairs of the Commonwealth shall have the full power and voice of the said freemen derived to them for the making and establishing laws, and to deal in all other affairs of the Commonwealth wherein the freemen have to do, the matter of the election of magistrates and other officers alone excepted, wherein every freeman is to give his own voice."

These were among the first provisions for political liberty which our ancestors made, and every one must recognize in them the distinguishing features of our government at the present day.

There is the same careful distinction between the Executive and the Legislative branches of the government, the same reference to the body of the people as the original source of all power; and there is a strong and distinct

assertion of the right of freemen to tax themselves,—a right to which their descendants have clung with unyielding tenacity, and which lies at the foundation of every free government.

In making these provisions, however, they departed from their charter, which did not recognize the right of representation; and since the body which framed this Bill of Rights, if I may so call it, had no legal existence, according to the principles of the English law, all acts done by this representative body were merely void.

They must have been aware of this fact; for we cannot suppose so good a lawyer as Winthrop ignorant of it, or careless of its application. We must look for an explanation to the ideas of civil polity which were very generally held by all classes in the colony at that time.

They distinguished civil subjection into necessary and voluntary. The former arose from residence, the latter from compact. They rejected the doctrine of indefeasible allegiance, maintaining that any man had a right to leave his country at any time, unless he thereby exposed it to danger; and that by leaving it that necessary subjection which arose from residence was at an end. They considered themselves bound to purchase, and they actually did purchase (I speak only of the first settlers of the colony) of the Indian princes who claimed the country, the soil and jurisdiction of the territory whereon they resided. This freed them from the subjection to the native chiefs, which would otherwise have arisen from residence within their territories. The King of Great Britain had pretended to grant the land to some of his subjects; and, in order to a quiet possession, they purchased this claim of the grantees. He had also given them a charter, by which they had entered into a compact with the king, the conditions of which they considered themselves bound to observe. Thus far they owed him allegiance, but no farther.

By this compact they were not at liberty to subject them-

selves to, or seek protection from, any foreign prince; they were to pay a sixth part of the product of all gold and silver mines; they were not to make any laws repugnant to the laws of England, &c.; but when they had complied with these conditions they felt at liberty to govern themselves as might be most agreeable to their own tempers and most for their own advantage.

This was in effect saying to the king, We have yielded to you certain of our rights: all others remain to us. His answer would undoubtedly have been, We have granted to you in your charter certain privileges: we cannot resume them while they are properly used; but you have already forfeited that charter by abusing it and usurping powers which it does not contain. And when, in 1686, a *quo warranto* was issued against the charter of Massachusetts Bay, if the colony had appeared to plead to the writ, that answer would probably have procured a judgment in favor of the Crown.

But, however inconsistent their ideas of civil polity might be with the principles of the English law, they are certainly quite reasonable in themselves, and very ingeniously adapted to their own situation. Let no one say they were unwise in acting in conformity with them; for though their success in framing and administering a government on this plan depended on circumstances beyond their control, and though the British monarch was prevented from visiting their encroachments on his prerogative with severe and speedy punishment only by having too many troubles and distractions at home to attend to the conduct of the colonies, still we owe them no little gratitude that, at this most important period of the first formation of their government, they asserted their rights with a degree of boldness nearly equal, if we consider their circumstances, to that of their descendants in later times.

It is, indeed, surprising that not only were the British Government ignorant of their real situation, but they were

for a long time unable to procure any satisfactory information concerning them. John Evelyn, who at one period of his life was a member of the Colonial Council, says in his Diary, under the date of May 26, 1671: "What the council most insisted on was to know the condition of New England, which appearing to be very independent in regard to Old England or his Majesty, rich and powerful as they now were, there were great debates in what style to write to them; for the condition of that colony was such, that they were able to break with all the other plantations about them, and there was fear of their breaking from all dependence on this nation. Some of our council were for sending them a menacing letter, which those who best understood the peevish and touchy humor of that colony were utterly against."

Afterwards, under the date of the 3d of August in the same year, he says: "The matter in debate was, whether we should send a deputy to New England, requiring them of the Massachusetts to restore such to their respective limits and possessions who had petitioned the council. This to be the *open* commission, but in truth with *secret* instructions, to inform the council of the true condition of those colonies, and whether they were of such a power as to be able to resist his Majesty, and declare for themselves, as independent of the crown, which we were told, and which of late years had made them very refractory."

Any one who calls to mind the condition of the Colony of Massachusetts Bay in 1671 — more than one hundred years before the commencement of the Revolutionary War — will be inclined to smile at the ignorance of the Colonial Council in supposing that colony able to declare for itself and set the British Empire at defiance. Considering the amount of intercourse between the mother country and the colonies at this period, it is wonderful that the colonists could impress the government at home with such an idea of their strength. They did so, and they acted on the strength of

this impression ; and, though they thus eventually lost their charter, they did not lose it till the whole people had learned what self-government was, and how to exercise it ; till habits of thought had been formed, and ideas of political liberty firmly fixed in their minds, which, so far as Massachusetts was concerned, were the great causes of the American Revolution.

And when the royal governor at last came, and with him came taxes of all descriptions,—from the petty exactions of his inferior agents up to his own severe impositions ; when the titles to their lands were questioned and set aside ; when, in short, to use the words of their active enemy, Randolph, “ They were ruled as though they had been the subjects of the Grand Turk,” — it was but teaching them, by the force of comparison, the value of their former quiet and happy government. They felt the force of the comparison. They learned the lesson thoroughly. No sooner was it rumored in the colony that William had landed in England, than, without waiting for news of his success, without knowing that they would not thus bring down the royal vengeance on their heads, there was a rush of popular feeling, and the royal authority was borne down by its violence in a single day. It was a sudden and rash revolution ; but it serves well to show with what reluctance the popular government had been resigned, and with what a spring they returned to it on the first opportunity.

Political science has made great advances during the last two centuries. The heights to which a few leading minds alone had then attained are now the common ground on which we all stand, so that it is exceedingly difficult for us to estimate correctly the political wisdom of our ancestors who lived two hundred years ago.

The formation of a Republic was then literally an experiment. It is true the revival of learning had placed within their view the magnificent structures of Greece and Rome ; but the peculiar constitutions of those States, which took

their form and hue from the character and temperament and modes of life of the people to whom they belonged, rendered them ill adapted to serve as guides in the formation of a free government for Englishmen in the seventeenth century. If it be admitted—and it must be admitted, for it is a self-evident principle—that a government is good or bad in proportion as it is adapted to the character and wants of its subjects, it needs no arguments to show that the government which was fitted for the Athenian populace was ill suited to the Puritans in the wilderness of America.

It is true also that the free Italian States were before their eyes; but an all-absorbing hatred of kingly power, which grew out of circumstances connected with their origin and early history, as well as a dread of foreign domination arising from their local situation in the midst of the great kingdoms which have since swallowed them up, had given to these governments an aristocratic tendency, and entirely unfitted them to serve as models to our ancestors. At the same time, their greatness and splendor, as well as the beautiful pictures of their respective governments which the writers of Greece and Rome had transmitted to posterity, rendered these examples attractive enough to be dangerous, though they were not wise enough to be useful.

But the first settlers of Massachusetts avoided this danger. Indulging in no splendid theories, they drew their ideas of government from observation and experience,—from observation of the character and relations of their society, from experience of the necessities and wants to which those relations gave rise. The consequences were not only that, after their government was established, their legislation was a succession of provisions to meet these wants as they arose (for this will always be the case when a people capable of self-government legislate for themselves), but the principles on which their government was based, as well as its whole plan, were naturally deduced from the character and condition of the people.

Much has been said of late years of their intolerant spirit; of their want of religious liberty; of the union between Church and State which existed among them; but it appears to me that any one who looks upon their government from the right point of view will discover in this very union clear proof of that practical wisdom of which I have just been speaking.

There is no doubt that this union did exist; for though they recognized no head of the Church but Christ, no ecclesiastical tribunal extrinsic to a particular assembly of Christians in one place, to which they gave the name of *a church*, to which such a church was subject, or by which it could be directed or censured, still they did allow the civil magistrates to interfere in ecclesiastical affairs.

“Every church,” says Lechford, “has power of government in and by itself, and no church or officer has power over one another but by way of counsel, saving that the General Court do now and then overrule some church matters.” Instances of the interference of the General Court, and of their “overruling church matters,” may be found in many parts of their early history. In the year 1653, they imposed a heavy fine on the church at Malden for choosing a minister without the consent of the magistrates; and soon after they restrained the North Church in Boston from electing one pastor, and even went so far as to recommend to them another. About the year 1650, Mr. Mathews, a minister, was fined £10 for preaching to a church which had been gathered without the consent of the magistrates.

Again, in chapter 17, sec. 3, of the Cambridge Platform, it is declared that “the power of the magistrates is not for the restraining of a church, or for the restraining of any other good work, but for the helping on and furthering thereof.”

But who is to decide what is the helping on of a church, and who is to pronounce what is a good work which is not to be restrained? Who but the magistrates themselves?

They are the judges both of what the power is and when it is to be exercised. With them it is deposited, to be used whenever they choose to say there is a fit occasion for it.

But says one of their greatest divines, "The gospel of Christ has a right paramount to every other right in the world. What is contrary to the gospel has no right, and should have no liberty." Who is to say what is contrary to the gospel? Is it the magistrate? Then are the magistrates' ideas of what the gospel teaches the rule by which the Church must be governed, and the rule by which all must walk.

On the other hand, the influence of the clergy in civil affairs was very great. The right of suffrage was extended only to freemen, and none were freemen who were not church members. Let us look a little further, and see how church members were made. They were first examined by the elders, and then propounded by them to their brethren for their vote. Upon the elders, then, it chiefly depended who should be admitted to, and who should be excluded from, the privileges of freemen.

Now all this strikes us at first view as wrong. We are ready to say at once, Here is no liberty, civil or religious. And so it is wrong as a theory, and would be wrong in practice, as applied to ourselves at the present day. But it is not as applicable to our own society that we must consider it. We must look at it in connection with their situation and character and wants; and, if we do so, we shall perceive its aptitude to them, and that as applied to their society it was essentially a free government.

In a community where all were church members, it would be no restraint upon the right of suffrage to make church membership a qualification for that franchise. In a community where all were church members except a few, and those either ignorant and degraded, or persons in the interest of the government at home, it was prudent and wise to impose this restraint. Such was the case with them; and

so it will be found that many, if not all those parts of their government which contradict our notions of liberty and right, grew out of the necessities of their case.

There are certain principles of civil polity which we look upon as fixed and undeniably true, and some of these principles are contradicted by this union between Church and State; but we should remember that expediency is the only true foundation of human government, and that what is expedient for us at this day was not necessarily so for them. "Human institutions cannot be wholly constructed on principles of science which is proper to immutable objects. In the government of the visible world, the supreme wisdom itself submits to be the author of the better; not of the best, but of the best possible in the subsisting relations. Much more must all human legislators give way to many evils rather than encourage the discontent which would lead to worse remedies. If it is not in the power of man to construct even the arch of a bridge that shall exactly correspond in its strength to the calculations of geometry, how much less can human science construct a constitution, except by rendering itself flexible to experience and expediency!"<sup>1</sup> I think you will agree with me when I say, that these anomalies in their government are no evidence of their want of attachment to the principles of a free government, but that, on the other hand, they are proofs of their practical wisdom, and their freedom from the many illusions which always beset the path of a people who are forming a new government.

The theory of our own government is now so well settled and so generally understood, political subjects are discussed with such freedom, and the practical tests so uniformly applied to them at the present day, that we can hardly estimate their danger of being misled by theory and speculation. History shows this danger by placing within our view the conduct of men in like circumstances with them-

<sup>1</sup> South.

selves. She points us to the Colony of Carolina, for which the celebrated John Locke drafted a constitution, which has served as a proof in all succeeding times how utterly absurd and inconsistent are the political theories formed by the philosopher in his closet, for the direction and government of affairs with which he has no practical acquaintance. She points us to the countrymen and contemporaries of the first settlers of this colony, who, at the suspension of the kingly power by the death of Charles I., were left free to form a new government; and she tells us that between Sydney and his adherents, with their darling democracy, on the one hand, and the fifth monarchy men, with their government of the saints, on the other, there was not a theory to which the human imagination in its wildest moods could give birth which was not broached, and did not find followers mad enough to adopt it; that a military despotism grew up on the patchwork ruins; and that, at last, the whole nation became tired of wandering in the pathless wilds of political speculation, and gladly received back the son of the tyrant whom they had beheaded.

But there is more fearful proof of this danger written on some of the darkest pages of the history of France.

Jean Jacques Rousseau framed a theory of civil society, which, while it was peculiarly calculated to fascinate noble and imaginative spirits, was equally fitted to catch the attention and win the affections of a thoughtless multitude. By an extended powerful combination of talented men of letters, this theory was instilled into the minds of the French populace, who were then ignorant and degraded, in conjunction with philosophical doctrines, which struck at the root of morality and religion; and when the old French government was swept away by the torrent of the Revolution, and a clear space was left for the erection of a new edifice, the theory of this philosopher was the foundation on which the National Assembly attempted to build,—a foundation which lasted only long enough to allow them to raise a

structure which, in its fall, buried themselves and thousands of their fellow-subjects and the liberties of France under its ruins.

From these evils our ancestors were preserved: partly by the wisdom and caution which they had learned from danger and difficulty and suffering; partly by the very marked and uniform character of their society, which was too inflexible to allow any great deviations from itself in their government; and partly also by another cause, which had an important influence on all the colonies, and greatly contributed to guard them from rash and foolish experiments in government.

I have already alluded to the fact that the English people were accustomed to look upon their rights and liberties as hereditary. Our ancestors brought this feeling with them to America; and not only in their early history, but down to the period of the Revolution, their liberties were uniformly claimed as the birthright of Englishmen. Even in the midst of the disputes which finally dissolved the connection between the colonies and the mother country, this feeling continually shows itself. In the State Papers of that period there is no pompous declamation about the abstract rights of man: they are firm and temperate and dignified assertions of the rights which had come down to them from their fathers.

Such a feeling was a constant check upon a wild and careless spirit of innovation. When they looked for the origin of their rights, they went, not to the ideal world of dreaming speculators, but to their own past history, where experience was ever waiting to teach them wisdom and caution; and when evil times came, and dangers were to be encountered for the preservation of their rights, or, what is a far better test of their disinterested love of liberty, when great and long-continued sacrifices were to be made to prepare their descendants for the reception and enjoyment and preservation of their privileges, they bethought them how

their rights had descended to them through a long line of honored ancestors, and how the fame of their fathers, as well as their own good name and the happiness of their posterity, depended on the transmission of them unimpaired to us.

If they had cause to look back on the past with these feelings, how much more cause have we, since it is to their unbending integrity, their cool courage, their spirit of enterprise, which no obstacles could check, no defeat subdue, their power of adapting themselves to all situations, of taking advantage of all circumstances, and, above all, to their spirit of stern self-sacrifice, that we owe our country itself, as well as the noble institutions which have come down to us, without labor or sacrifice on our part, who live so securely and happily under them! And how sacred a duty should we esteem it, not only to transmit these institutions unimpaired to our posterity, but to hold in fresh and grateful remembrance those to whom we owe them!

Here on this spot, which was so long one of their outposts; in the midst of the descendants of a part of their number who cut themselves off from their countrymen, and boldly threw themselves into the wilderness, which was the home of their savage foe, that they might have a place where they could worship God in their own way,—I should have felt like an unlineal son if I had forgotten those who so uprightly and piously lived, so patiently and firmly suffered, and so heroically died for conscience' sake and the sake of New England.

Think not that I detract from the fair fame of Washington by giving them their due. I am but laying bare the broad and deep foundation on which his greatness rests. That foundation is the character and principles of the people with whose interests he always identified himself while living, and with whose greatness his own fame is identified now that he is dead. History would do him comparatively little honor by saying that he was a great general or a great

AN ADDRESS DELIVERED AT DEERFIELD, MASS. 61

statesman. There have been thousands of such men, and the weakest and the wickedest have often been first among a nation of slaves. But when she tells us that he was first in war among a brave people fighting for their rights, first in peace among a wise people governing themselves, and first in the hearts of his free and discriminating countrymen, she places him on a height from which he may look down on the world.

ASA OLMSTED *versus* DANIEL WELLS.

ACTION FOR A LIBEL.

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BRIEF FOR ARGUMENT FOR DEFENDANT.

WE shall maintain that this action cannot be supported on the evidence because,—

I. The alleged libel was a paper composed and published "in the course of justice;" and therefore an action for a libel cannot be supported, even though the defendant had no probable cause to believe that its contents were true, and was actuated by malice in composing and publishing it.

II. The bar is a body competent to institute inquiries into the official misconduct of its members, and of course may appoint an agent for the purpose of conducting those inquiries. The defendant was their agent for this purpose, and acted within the scope of his agency, and therefore cannot be liable to an action for so doing.

III. The bar is a body having a right to inquire into the official misconduct of its members; and therefore a communication made to the bar by a member, in regard to the official misconduct of another member, is a privileged communication, and an action for a libel cannot be maintained for it, unless the plaintiff proves that the defendant had no probable cause to believe the libel true, and resorted to this communication to gratify his ill-will against the plaintiff.

IV. There is a fatal variance between the libel alleged and the libel proved.

As to the first point, it is very clear that for a paper composed and published in the course of justice no action for a libel can be maintained. 1 Hawk. P. C. 354. He says it hath been resolved "that no false or scandalous matter contained in a petition to a committee of Parliament, or in articles of the peace exhibited to justices of the peace, or in any other proceeding in the regular course of justice, will make the complaint amount to a libel."

This doctrine is supported by numerous authorities from Lord Coke's time to the present day. *Cutler v. Dixon*, 4 Co. 14 b; *Weston v. Dobniet*, Cro. Jac. 432; *Lake v. King*, 1 Saund. 131 a, and Serj. Wms'. n. 1; *Astley v. Younge*, 2 Bur. 807; *King v. Bayley*, rep. in 2 Esp. Dig. 91 and Bac. Ab. Libel, A. 2; *Weatherston v. Hawkins*, 1 T. R. 110; 2 Phil. Ev. 109; Bac. Ab. Libel, A. 4; *Jarvis v. Hatheway*, 3 Johns. 180; *Thorn v. Blanchard*, 5 Johns. 508; *Allen v. Crofoott*, 2 Wend. 515; *Harris v. Lawrence*, 1 Tyler, 164, and *Harris v. Huntington*, 2 Tyler, 129; *Remington v. Congdon*, 2 Pick. 314; *Commonwealth v. Blanding*, 3 Pick. 314; Starkie on Slander, ch. 11.

This court has power to confer on the bar authority to make inquiry concerning the official misconduct of its members, and, if sufficient evidence of misconduct is found, to present the same to the court for the court to act thereon.

That the court may do this may be shown:—

I. From the general principle, that having a summary jurisdiction over its own officers, in respect to their official conduct, it may make rules for the orderly and convenient exercise of this jurisdiction.

A rule that the bar should act as an inquest in respect to the official conduct of its members would be highly convenient and beneficial to the court, the bar, the community, and the accused. *Home v. Bentinck*, 2 B. & B. 130 (6 E. C. L. R. 68).

II. From authority as early as Michaelmas Term, 1654, a rule was made both in the King's Bench and Common

Pleas in England that a jury of able and credible officers and clerks should be empanelled once in three years, and sworn to inquire: 1st. Of the falsities, contempts, misprisions, and offences committed by attorneys. 2d. To present to the court the names of all the attorneys and clerks that should be notoriously unfit to continue on the rolls, or to be admitted. 3d. To present such as have exacted new and improper fees. 2 Pet. Ab. 607, n.

This court has the same power to create such an inquest.

It is not to be doubted that, if such an inquest should exist, all the usual and proper proceedings before it, the subject-matter of which was within its jurisdiction, would be judicial proceedings, or "proceedings in the course of justice."

They are the proceedings of the court.

The only remaining question is, Has this court conferred this authority on the bar?

Not necessary to have a written rule to show this; for the practice of this court is made up of three kinds of rules:—

I. Written rules.

II. Decrees which are made from time to time in a cause, for the purpose of bringing it to a proper termination.

III. Unwritten rules derived from common usage, and forming the common law of the court.

Under this last species comes this whole jurisdiction of the court over its own officers. It is that power to punish for a contempt which is inherent in the nature of all common-law courts, derived from immemorial usage and recognized by Magna Charta itself. 4 Bl. Com. 286.

This word "contempt" being of very extensive signification, and applying to all the fraudulent and dishonest acts of the officers of the courts, such acts being contempts of the purity of the court. Bac. Ab. Att. A.; Com. Dig. Att. A.; 3 Johns. 398.

Since, then, this whole jurisdiction rests upon usage;

usage is sufficient and proper evidence to show the mode in which this jurisdiction should be exercised, or, in other words, to show that the court have conferred upon the bar authority to act as an inquest in such cases.

I. It is the settled practice for the bar to act as an inquest.

II. This practice is recognized and sanctioned by the court.

III. It is highly reasonable and convenient.

Not an objection to the form of the action.

Great importance of this jurisdiction of the bar.

But if the bar in these proceedings did not act under the authority of the court, and its proceedings are not in the course of justice, still the bar has a right to institute inquiries into the conduct of a member, and may appoint an agent for this purpose; and while that agent acts within the scope of his agency, he does no wrong, and of course is liable to no action.

IV. The bar have a right to make these inquiries, —

1. In order to inform the court, which receives the memorials of the bar on this subject, and thereby sanctions the inquiries which led to them.

2. The plaintiff, on entering the bar, voluntarily subjected himself to the discipline of that body. *Remington v. Congdon*, 2 Pick. 314; *Home v. Bentinck*, 2 B. & B. 130 (6 E. C. L. R. 68), where it is said by the Chief Justice: "It is quite impossible not to perceive that the plaintiff in this case, when he did become an officer in the army, knew that in point of fact he voluntarily subjected himself to that court of inquiry to which he must have known that officers in other instances had been made amenable."

3. The bar has this right, because it is an association the members of which sustain numerous important and delicate relations towards each other, and the whole body has a deep interest in the official conduct and character of each of the members.

As to master and servant. *Rogers v. Clifton*, 3 Bos. & P.

592; *Weatherston v. Hawkins*, 1 T. R. 110; *Child v. Affleck*, 9 B. & C. 403. Are not the relations of the members of the bar such towards each other as to render communications to the bar equally privileged as communications to a master? So where a letter was written to a firm of bankers, conveying charges to the plaintiff, who was their solicitor, this was held to be a privileged communication. *M'Dougall v. Claridge*, 1 Camp. 267. *Vide* also 1 Camp. 269, and J. Howe's note to 3 Camp. 296, *Fowler v. Homer*. So communications made to a congregation respecting a clergyman about to be appointed minister of that congregation are privileged. *Blackburn v. Blackburn*, 3 Car. & P. 146; *Barbaud v. Hookham*, 5 Esp. 109. So communications made by a bank director to the board of which he is a member, affecting the credit of a merchant, are privileged. *Sewall v. Catlin*, 3 Wend. 291.

The general principle to be deduced from these cases is that, when a person sustains relations to an individual or an association of individuals, that individual or association has a right to inquire into those particulars of his conduct and character which concern those relations.

This is a dictate of the highest of all laws, viz. of self-preservation.

Relations exist between each individual member of the bar and all the rest.

Associated together in causes and professional reputation, the honor of one may be ruined by the dishonesty and fraud of his associate.

The interests of their common client depend on the confidence which associates repose in each other.

Opposed to each other there is a still greater demand for confidence in the honor and integrity of a brother.

If the bar may institute these inquiries, of course they may appoint an agent to put the charges which exist in the community, against a member, in writing, and to lay them before the bar and the accused, that the bar may know

what they have to examine, and the accused may know what he is to answer.

Of course, if such an agent is appointed, and acts within the scope of his agency, he does no wrong, and cannot be punished.

This defendant acted within the scope of his agency.

Burden on the plaintiff to prove he did not.

Acts of the bar prove that he did so act.

If the alleged libel cannot be considered as composed and published by the defendant as the agent of the bar, still, as it was a communication to the bar by one member concerning the official conduct of another member, it is a privileged communication, and no action can be maintained upon it unless the plaintiff proves that the defendant had no probable cause to believe the charges true, and resorted to this mode of gratifying his ill-will against the plaintiff.

This was a privileged communication.

Refer to cases under last point.

Also, *Gray v. Pentland*, 4 S. & R. 420.; *Remington v. Congdon*, 2 Pick. 314; *Bodwell v. Osgood*, 3 Pick. 384. Plaintiff submitted himself to the jurisdiction, and the charges were voted true.

Actual malice must be shown, &c. *Supra*, all cases on the last point. 3 B. & P. 592; 2 Pick. 314; 3 Pick. 384. *King v. Root*, 4 Wend. 113; Gilb. Cas. L. & E. 190; 2 B. & C. 257; 3 Ibid. 584; 1 Chit. Gen. Practice, 46.

“Malice, said to be the gist of the action in suits for libel or verbal slander, does not mean ill-will towards the individuals affected, in the ordinary sense of that term. In ordinary cases of slander, the term maliciously means intentionally and wrongfully, without any legal ground of excuse. Malice is an implication of law from the false and injurious nature of the charge, and differs from actual malice or ill-will towards the individual, frequently given in evidence to enhance the damages.

“Privileged communications are *prima facie* excusable

from the cause or occasion of speaking or writing; but, even in the case of such communications, an action will lie, if the party making the communication knows the charge to be false, and adopts that mode of gratifying his ill-will or malice. In such cases, however, actual malice must be shown, and the question will be submitted to a jury."

Burden, therefore, on plaintiff to show want of probable cause and ill-will.

Can infer malice from want of probable cause, but cannot infer want of probable cause from malice. Yelverton, 105 *a*, note, and authorities there cited.

Plaintiff has given no evidence of either.

Has given evidence of probable cause.

Votes of the bar.

What amounts to a question of law. Starkie on Evidence, Part IV. p. 912, n. *a*.

As to introducing record. *Maybee v. Avery*, 18 Johns. 352.

There is a fatal variance. 1 Camp. 353; 5 B. & A. 615; 13 East, 554.

## THE CASE OF THE SLAVE MED.

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THE facts of this case are given *ante*, vol. i. p. 186, *et seq.* It is reported in the eighteenth volume of Pickering's Reports, p. 193, under the title of *The Commonwealth v. Aves.* The following argument was made in August, 1836:—

MAY IT PLEASE YOUR HONORS:

In the argument which I am about to address to the court, I shall endeavor to maintain the following proposition:—

That a citizen of a slaveholding State, who comes to Massachusetts for a temporary purpose of business or pleasure, and brings his slave as a personal attendant on his journey, may restrain that slave for the purpose of carrying him out of the State, and returning him to the domicile of his owner.

This proposition is broad enough to cover the case before the court. If the owner, under such circumstances, has a right to restrain his slave for the purpose of removing him to his domicile, then the custody of the respondent in this case is a lawful custody, and the child cannot be discharged from it.

I shall make two points in support of this proposition:—

I. That this child, by the laws of the State of Louisiana, is now a slave.

II. That the law of Massachusetts will so far recognize and give effect to the law of Louisiana as to allow the master to exercise this qualified and limited power over his slave.

The first point is free from all difficulty. It is perfectly clear that this child, being a slave by the laws of the State of Louisiana, and having left that State only for a temporary purpose, is a slave now by the laws of Louisiana. She has not been emancipated by coming into a State where slavery is not recognized by the law. And the moment she returns again, either to Louisiana or any other State or County where slavery is a legal institution, the right of the master would be recognized as still subsisting, and as having always subsisted, and would be enforced without the least diminution on account of the temporary residence of the slave in a non-slaveholding State. We need look only to a decision of the courts of the State of Louisiana, to be satisfied that such is the law of that State.

In a case reported in 14 Martin's Reports, 405, the question came before the court whether a slave, who had been removed into the North-Western Territory, and domiciled there, was still a slave on his return to Louisiana. The North-Western Territory, being under the government of the celebrated ordinance of Mr. Dane, was of course a non-slaveholding territory; and the court held that, as the slave had gained a domicile in that territory, he was thereby emancipated. But it is hardly possible to read the judgment of the learned court in the case, without perceiving that their decision would have been against the freedom of the complainant, if he had gone into the territory only for a temporary purpose. If we look at the reports of the decisions of other courts, we shall find that this very point has been repeatedly decided.

In a case reported in 2 Marshall's Kentucky Reports, 467, the Court of Appeals in Kentucky, at that time composed of some very eminent judges, decided that a slave, who was carried by his master into the North-Western Territory for a temporary purpose, was still a slave on his return to Kentucky. The learned counsel, on the other side, may perhaps not be inclined to give entire credit to these deci-

sions, because they were made in slave States; but I will now refer your Honors to a decision of this point made by one of the greatest judges who ever sat on any bench in any country, and who will not be suspected of any undue bias in favor of this institution.

In the matter of the slave Grace,<sup>1</sup> Lord Stowell, sitting in the High Court of Admiralty, decided that Grace, a female slave, who accompanied her mistress from Antigua to England, and resided there six months, was a slave on her return to Antigua; that although the rights of the mistress over the slave were suspended while in England, because the English common law provided no means of enforcing those rights, yet they existed, and might be exercised and enforced on the return of the slave to Antigua. I have only to add to the authorities which I have cited the fact that I have not found any thing in the books which at all conflicts with them, and therefore I think I was warranted in saying that in the first point there is no difficulty; that this child is now a slave by the law of Louisiana; and that, whether the rights of the master are partially or entirely suspended by coming into our territory, those rights are still in existence, and would be recognized and enforced by the law of the domicile of the master and the slave. I proceed therefore to consider the second point:—

That the law of Massachusetts will so far recognize and give effect to the law of Louisiana as to allow the master to exercise the qualified and limited right over his slave which is claimed in this case.

Before I proceed to discuss this question, I shall submit to your Honors that it is competent for this court to decide it. No legislation is necessary. It is the proper province of this court to determine whether any and what effect is to be given to the law of another State within our own territory. I refer your Honors to Story's Conflict of Laws.<sup>2</sup> The learned author is here considering how the rule as to foreign

<sup>1</sup> 2 Haggard's Admiralty Reports, 94.

<sup>2</sup> Page 25.

laws is to be promulgated, whether it should be done by the legislature or the judicial power. He says, "In England and America, the courts of justice have hitherto exercised the same authority" (that is, the authority in question) "in the most ample manner; and the legislature has in no instance (it is believed), in either country, interfered to provide any positive regulations. The common law of both countries has been expanded to meet the exigencies of the times as they have arisen; and, so far as the practice of nations and the *jus gentium privatum* has been supposed to furnish any general principle, it has been followed out with a wise and manly liberality."

So Chief Justice Parker, in *Blanchard v. Russell*,<sup>1</sup> says, "As the laws of foreign countries are not admitted *ex proprio vigore*, but only *ex comitate*, the judicial power will exercise a discretion with respect to the laws they may be called upon to sanction." And the same doctrine, substantially, was laid down by Lord Stowell.<sup>2</sup>

It is clear, therefore, that it is competent for the court to decide the question which we present to them.

I now ask your Honors' attention to what I think is the principal question in the case before you. It cannot be denied that the general principles of international law are broad enough to cover this case. I shall consider presently whether the case comes within any exception to those general rules. What I now wish to prove is that the case is within certain general rules, unless it is to be excepted out of them.

Slaves are looked upon in all codes, I believe, in two lights, as persons and as property. What is the general rule of international law applicable to them as persons? *Qualitas personam sicut umbra sequitur*, is a rule found in all the principal writers on this branch of the law. "Personal capacity or incapacity, attached to a party by the law of his domicile, is deemed to exist everywhere, so long as his

<sup>1</sup> 13 Mass. 6.

<sup>2</sup> 2 Haggard's Con. Rep. 59.

domicile remains unchanged, even in relation to transactions in a foreign country, where they might otherwise be obligatory.”<sup>1</sup> “We always import” (says Lord Ellenborough in the case of *Potter v. Brown*<sup>2</sup>), “together with their persons, the existing relations of foreigners as between themselves, according to the laws of their respective countries, except indeed where those laws clash with the rights of our own subjects here.”

If we consider the rules applicable to slaves as the property of foreigners, we shall find them to be equally decisive.

Pothier, after remarking that movable property has no locality, adds that “all things which have no locality follow the person of the owner, and are consequently governed by the law or custom which governs his person, that is to say, by the law of the place of his domicile.” And I refer your Honors to the work which I have already so often cited, and which every one must cite who touches upon a subject which the distinguished author has treated with such learning and ability, Story’s Conflict of Laws,<sup>3</sup> where numerous authorities on this rule are collected. I submit to your Honors that this rule has a more extensive application than merely to regulate the forms of transfer or the order of succession to personal property. Thus to limit its effect would be to stop far short of its real meaning, and I may add far short of the effect which it has been allowed to have. It means that a right to a movable thing, acquired in one country under its laws, ought not to be, and is not, devested by removing that thing into another country. And here again I must refer the court to the commentaries on the Conflict of Laws.<sup>4</sup> There is another view which may be taken of this principle, by which its justice and expediency will clearly appear. “Even the property of individuals,” says Vattel,<sup>5</sup> “is, in the aggregate, to be considered

<sup>1</sup> Story’s Conflict of Laws, 64.

<sup>2</sup> 5 East, 130.

<sup>3</sup> Pages 209, 312, 213.

<sup>4</sup> Pages 334, 335, 336.

<sup>5</sup> Page 168.

as the property of the nation, in respect to other States. It in some sort really belongs to her, from the right she has over the property of her citizens, because it constitutes a part of the sum total of her riches and augments her power. She is interested in that property by her obligation to protect all her citizens. In short, it cannot be otherwise, since nations act and treat together as bodies, in their quality of political societies, and are considered as so many moral persons. All those who form a society, a nation, being considered by foreign nations as constituting one whole, one single person, — all their wealth together can only be considered as the wealth of that same person. Its domestic relations make no change in its rights with respect to foreigners, nor in the manner in which they ought to consider the aggregate of its property, in what waysoever it is possessed." He then goes on to deduce from this principle certain rules of the law of nations, which are fairly deducible from it, and are now well settled, and among others the following: "The property of an individual does not cease to belong to him on account of his being in a foreign country: it still constitutes a part of the aggregate wealth of his nation. Any power, therefore, which the lord of the territory might claim over the property of a foreigner would be equally derogatory to the rights of the individual owner and to those of the nation of which he is a member." The rule on which we rely is, therefore, deducible from this great principle of the law of nations; and I need not say that the application of this principle to the citizen of one of our sister States is, to say the least, quite as just and politic as to the citizen of a foreign country.

I submit to the court, then, that by the general rules of international law, whether we consider this slave as a person or as property, the rights of the master, acquired under the law of the domicile, are to be recognized and preserved, unless there is something in this case which excepts it out of those general rules. I proceed, therefore, to inquire

whether there is any exception to these rules applicable to this case.

There are two well-settled exceptions, and only two, that I have been able to discover. The foreign law is not allowed any effect: —

I. When it would work injury to the State or its citizens.

II. When the law is in itself immoral.<sup>1</sup>

In the case of *Greenwood v. Curtis*,<sup>2</sup> Chief Justice Parsons states these exceptions in somewhat different terms, though substantially there is no difference. He says there are two exceptions: "One is when the Commonwealth or its citizens may be injured by giving effect to a foreign law. The second is where the giving effect to a foreign law would exhibit to our own citizens an example pernicious and detestable."

I shall endeavor to maintain that it would work no injury to the State or its citizens to give to the law of Louisiana the qualified and limited effect which we ask for in this case, and, secondly, that slavery is not immoral. Before I proceed to speak of these points, I feel obliged to anticipate an objection, which will undoubtedly be pressed by the learned counsel for the petitioner, and which certainly comes from high authority.

"The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate." — LORD MANSFIELD, *in the Case of Sommersett*.

It will be urged that, though we claim to exercise only a qualified and limited right over the slave, viz. the right to remove him from the State, yet, if this is allowed, all the rights of the master must be allowed. That the same for-

<sup>1</sup> Story's Conflict of Laws, 96; 2 Kent's Com. 39.

<sup>2</sup> 6 Mass. 378

eign law, which gives the master a right to remove the slave from place to place, gives him a right to his labor, and to compel him to labor; and that, if this foreign law is recognized at all, full effect must be given to it, and thus slavery will be introduced into the Commonwealth.

To this I answer: —

1st. There is no practical difficulty in giving this qualified effect to the law of Louisiana. The Constitution of the United States has settled this question. That provides for and secures to the master the exercise of his right, to the precise extent claimed in this case.

2d. Neither is there any theoretical difficulty. Not to refer again to the Constitution, which, being positive law, may be supposed to cut a theoretical knot, I think I can show that English judges, since Lord Mansfield's day, have not found this difficulty insurmountable, even in regard to this very relation of slavery.

Several cases have occurred in the High Court of Admiralty in England, where ships of other nations, engaged in the slave trade, have been captured by British cruisers, and brought in for condemnation. In the cases where the slave trade was forbidden by the laws of the nation to which the vessel belonged, they were condemned. In other cases, where the slave trade was lawful by the laws of the nation to which the vessel belonged, the vessel and slaves were restored to their owners. The court looked to the foreign law. If by that law the owners of the vessels could acquire a property in the slaves, that property was respected, and the slaves were given up. Now here the relation between master and slave, which existed by the foreign law, was recognized by the English law, and effect given to it, so far as to allow the owner to remove them.<sup>1</sup> So, in the case of *Madrazo v. Willes*,<sup>2</sup> a British cruiser captured a Spanish slave-ship, and the Court of King's Bench allowed the

<sup>1</sup> *The Amedie*, 1 Acton, 240; *Fortuna*, 1 Dod. 80; *The Diana*, 1 Dod. 95; *The Louis*, 2 Dod. 238.

<sup>2</sup> 3 B. & Ald. 358.

owner to recover of the captain £30,000 for the loss of his slaves. Here also was a strong recognition of the relation between master and slave, and an important effect given to that relation. But I suppose that the judges who decided those cases would have been greatly surprised, if they had been told that, by recognizing the right of the master over his slave to any extent, they had in effect recognized it for all intents and purposes whatsoever; and that they had thereby introduced slavery into England. I refer the court also to the case of *Emerson v. Howland*,<sup>1</sup> for a decision made in this Commonwealth, founded upon the same principles as the case in 3 B. & Ald.

There is a decision of Chief Justice Reed of Lower Canada,<sup>2</sup> which throws light on this point. The case was as follows: A citizen of the State of Vermont committed a larceny there, and fled into Canada. The executive of the State of Vermont requested the Governor of that province to deliver up the fugitive. The Governor caused the thief to be arrested, and thereupon a habeas corpus was sued out, and the man was brought before the chief justice. In a very learned and elaborate opinion, the judge decided that it was a proper exercise of the executive power, not only consistent with the laws of nations, but required by national comity, to deliver up the delinquent to the authorities of the State of Vermont. Now why did not the chief justice say that the crime committed by the thief being an infringement of a foreign law, if that law was recognized at all, it must be recognized to its full extent,—if any effect should be given to it, full effect must be given to it; that the State of Vermont had the same right to try, condemn, and punish the thief that they had to remove him; and, as the Governor of Canada could never permit the State of Vermont to exercise all these rights within his territory, he could not recognize their right at all, nor permit the least interference with the liberty of the fugitive while on the

<sup>1</sup> 1 Mason, 45.

<sup>2</sup> Reported in 1 American Jurist, 297.

soil of Canada. I am unable to perceive why such a course of reasoning would not have been equally applicable to that case as to the case at bar. And the answer there, as here, is, that although the rights arising under a foreign law, and properly exercisable on such foreign territory, cannot, consistently with our domestic policy, be exercised on our own territory, yet that is no reason why we should not allow the foreigner to remove the subject of those rights to his own territory, there to do what his law requires or allows.

The question in both cases is, whether national comity requires the nation, where the subject of the rights claimed is, to allow such subject to be removed; and it is not at all necessary to give effect to any rights or relations other than the right of removal, nor even to consider or take notice of any other rights or relations, except so far as they constitute or destroy a claim on the comity of the nation to permit the removal. I submit to your Honors also that there is no difficulty in holding that a judicial tribunal may allow a qualified effect to a foreign law. If there are considerations which forbid the court from allowing a foreign law to produce all its usual and natural effects on the relations of foreigners who come within our territory, but at the same time it will work no injury to the Commonwealth or its citizens, and will exhibit no bad example, to allow some of those effects; if the doing so will at the same time promote harmony and good feeling, where it is extremely desirable to promote it, encourage frequent intercourse, and soften prejudices by increasing acquaintance, and tend to peace and union and good-will, — why should not the foreign law be allowed to have this useful and just operation within our territory? Useful, because it produces only good effects; just, because it preserves relations acquired at home and brought here with the expectation of preserving them, and which are in no way injurious to ourselves. Such I understand to be the opinion of Mr. Justice Story.<sup>1</sup> “A State

<sup>1</sup> *Conflict of Laws*, 24.

may recognize and modify and qualify some foreign laws; it may enlarge or give universal effect to others." I have already shown, by citations from this book, that it is the province of the judicial power to declare what effect a foreign law shall have; and of course it follows that, when the learned author says a State may modify and qualify some foreign laws, he means that the judicial power of the State may do this.

I have endeavored to prove that the qualified and limited right which we have claimed in this case may be properly claimed and allowed, without giving full effect to the foreign law concerning master and slave; and I will now attempt to show that to permit such an exercise of the right of the master will work no injury to the State or its citizens.

I. It will work no injury to the State, by violating any public law of the State. The only law in our Statute Book applicable to the subject of slavery is the law against kidnapping.<sup>1</sup> It provides that no person shall, "without lawful authority, forcibly or secretly confine or imprison any other person within this State, or forcibly carry or send any such person out of this State," &c. It does not define the "lawful authority:" it leaves that as it found it. In short, it provides a penalty for an offence, the gist of which depends on the common law; and to say that the statute applies to this case is the same thing as to say that the master has no "lawful authority" to confine this slave, which is the very question to be decided.

II. It will work no direct injury to the citizens of this State, for it has no direct effect on its citizens. It respects only strangers.

III. I am aware that these two divisions by no means dispose of all or even of the principal difficulties. A State may be injured as vitally by infringements upon its public policy as by breaches of its laws; and I shall endeavor to show that it is consistent with the public policy of Massa-

<sup>1</sup> Rev. Stats., c. 125, § 20.

chusetts to permit this qualified and limited exercise of the right of the master. I know that this is a wide field, that it involves considerations so broad and deep that I cannot hope to reach or grasp them; but while I feel confident that the court will perceive and give due weight to all these considerations, I also feel it to be my duty to suggest to your Honors such as have occurred to my own mind. And, first, I beg your Honors to bear in mind that we are considering the policy of Massachusetts towards citizens of other States, and not towards her own citizens. Laws and institutions may exist in other States, which are inconsistent with our own policy. We cannot therefore allow our own citizens to create such institutions in our territory; we cannot permit foreigners to import them here; but, at the same time, it may be perfectly consistent with our policy, not only to recognize the validity and propriety of those institutions in the States where they exist, but even to interfere actively, to enable the citizens of those States to enjoy those institutions at home. To illustrate my meaning: suppose the province of Canada should abolish capital punishment, upon the ground that it was immoral, inexpedient, and contrary to their public policy, and a murderer should escape from Vermont into that province. The public policy of Canada in respect to capital punishment within its own territory would hardly furnish a sufficient reason for refusing to deliver up the murderer to the authorities of Vermont.

There is another principle, which seems to me important to be kept in view. In considering whether a stranger should be allowed to exercise this right, it is of the utmost importance to keep in view the relations between the State of which such stranger is a citizen and our own State. A very little reflection will convince the court of the truth of this. We close our courts of justice to an alien enemy. We open them to an alien friend, for personal actions. We open them to the citizens of our sister States, in all actions. The very phrase which is made use of to express the founda-

tion on which the admission of all foreign laws rests illustrates this truth. National comity is that foundation. Now what may be a proper comity in one case may by virtue of a treaty be turned into a right in another, and may be wholly done away in a third, either by a want of due comity on the other side, or in some other way. In short, it is perfectly clear that there can be no general rule, binding in all cases, and in regard to the citizens or subjects of all foreign States, even in respect to the exercise of the same right or the existence of the same relation. Our relations to one foreign State may render it perfectly consistent with our public policy to permit a citizen of that particular State to do an act within our territory, which our public policy towards another foreign State would require us to forbid its citizens from doing. What, then, are the relations which we sustain to the State of Louisiana, which ought to affect our public policy towards her citizens? She is not a foreign State. We are bound up with her, by the Constitution, into a Union, upon the preservation of which no man doubts that our own peace and welfare depend. Other nations may cherish friendly relations, and endeavor to promote frequent intercourse, from a fear of foreign war or a desire of commercial prosperity. But to us these relations and this intercourse have a value and importance which are inestimable. They are the grounds of safety for our domestic peace and the happy institutions under which we live. Thirteen States of this Union are slaveholding States. Negro slavery has become incorporated into all their institutions. It is infused into their agriculture, their commerce, their mechanical arts, their domestic relations. Their laws and policy bear marks of it in every line. To secure its advantages, to lessen the evils which are inseparable from it, and to avert the overwhelming destruction which it threatens, occupies the thoughts and engages the anxious solicitude of almost every man in those States. And great as is the importance of this institution to them, in every point of

view, there can be no doubt that it occupies in their minds quite as prominent a place as it deserves. Your Honors will not forget that we are dealing with this institution thus existing in our sister States, and thus deemed to be all-important, and being in fact of vast importance to those States; that we are considering whether a citizen of one of those States, whom our interest as well as our inclination should lead us to welcome here, can be allowed, consistently with our public policy, to exercise a right growing out of this important institution, when the exercise of that right violates no public law of the State, and has no direct effect upon any citizen of the Commonwealth.

I cannot but think that the Constitution itself furnishes a guide, and a safe guide, in the question. I say a guide, and not a controlling authority; for I take it to be clearly settled that the Constitution applies only to the case of fugitive slaves. But when we find that the States, in the solemn compact which they made with each other, provided for the exercise of this right in certain cases, it gives us some reason to believe that it is consistent with the public policy of Massachusetts to protect the right of the master to that extent, at least. I know it will be urged that the non-slaveholding States came into this measure unwillingly, and this for the very reason that it was contrary to their policy; but, unless it was on the whole consistent with their policy, it is clear they would never have come into it at all. Massachusetts undoubtedly assented to this article in the Constitution for different reasons from those which operated on South Carolina; but her reasons were sufficient. She assented to it of her own free will, and it was as much her free act as it was the free act of any State which came into the Union. It will be urged also, by the learned counsel for the petitioner, that although we have assented to the exercise of this right in one class of cases, yet the fact that this limitation exists is an argument to prove that the exercise of the right, in any other case, would be contrary to our

policy; that if it was not contrary to the policy of the non-slaveholding States to permit the master to exercise the right which we claim in this case within their territory, we should find a provision adapted to this case in the Constitution. To this argument there are several answers. In the first place, the Constitution provides for that class of cases which was most important. It furnishes a remedy for an evil which had been deeply felt by the Southern States during the existence of the Confederation. It is a class of cases, too, which requires the active interposition of the law and the application of the civil power in aid of the master's right. It is by no means a necessary inference that all other cases whatsoever were disregarded or deemed to be without remedy. The slave States, having procured the insertion of this provision, might be willing to leave other cases to the voluntary comity of the non-slaveholding States. On the other hand, the non-slaveholding States, though they might be unwilling to be bound through all time, and amidst all changes, to afford the aid of their civil power to enforce any right of the master in their territories, might be quite willing to accord as a favor and as a matter of comity even more than they were willing to surrender as a matter of right. Does not the course of legislation in some of the States prove this? Very soon after the adoption of the Constitution, four non-slaveholding States passed laws, securing to citizens of slave States, who came within their territories as travellers, and brought their slaves with them, a right to remove those slaves from the State, and return them to their domicile.<sup>1</sup> In other words, the legislatures of those States secured to the master the very right which we claim in this case. It may be argued, perhaps, that the very existence of these statutes proves that some action of the legislature is necessary, and that this court is not competent to do what those legislatures have done; but,

<sup>1</sup> 1 Rev. Laws of N. Y. 657; Laws of R. I. 607; Purdon's Digest of Pennsylvania Laws, 6; Laws of N. J. 679.

if the court will examine those statutes, they will perceive why some action of the legislature was necessary there, and that the same reason does not exist in this Commonwealth. In those laws, the legislatures forbid, under a penalty, the introduction of slaves into their several States. Feeling the force of the objection, that they had thus cut off almost entirely the access of citizens from the Southern States, and that so to shut out those persons would be impolitic and unjust, they go on to make an exception in favor of travellers who come into their respective States for temporary purposes. But in Massachusetts there is no law forbidding the master to bring his slave here, the legislature has never acted at all on the subject, and of course it has never become necessary to introduce any such exception.

I cannot but believe that these laws of Pennsylvania, New York, New Jersey, and Rhode Island, have an important bearing on this question. The legislatures of those States are the legitimate and highest authority, in regard to their public policy. What they have declared on this subject must be deemed to be true; and where they have passed a law securing to the master the right which we claim in this case, and have continued the law to the present hour, we are not at liberty to suppose that it is contrary to their public policy that the master should exercise this right within their territory. I respectfully ask the court to consider what difference there is between the policy of Pennsylvania, New York, Rhode Island, and New Jersey, and the policy of Massachusetts, on the subject of slavery.

I have gone through with such suggestions, in respect to this question of public policy, as have occurred to me; and I leave it in the hands of the court.

I shall now attempt to prove that slavery is not immoral, and that to allow the master to exercise this right will not exhibit to our citizens an example pernicious and detestable. I wish not to be understood to advocate slavery, as consistent with natural right. I do not believe it to be consistent

with natural right. If this cause or any cause required me to maintain that slavery was not a violation of the law of nature, I would abandon it. But this cause does not require its advocates to do this. The terms "moral" and "immoral" have very wide and various meanings, and of course it is necessary to settle the meaning of this word before we look further. I take it to be perfectly clear that the standard of morality by which courts of justice are to be guided is that which the law prescribes. Your Honors' opinion as men or as moralists have no bearing on the question. Your Honors are to declare what the law deems moral or immoral. Such was the opinion of Sir William Scott.<sup>1</sup> Such also was the opinion of Chief Justice Marshall:—

"Whatsoever might be the answer of a moralist to the question, a jurist must search for its solution in those principles of action which are sanctioned by the usages, the national acts, and the general assent of that portion of the world, of which he considers himself as a part, and to whose law the appeal is made."<sup>2</sup>

The question therefore is, whether, when measured by the standard of our law, slavery is immoral. Upon this question, I again refer the court to the case in 3 B. & Ald. 353, where the Court of King's Bench allowed the owner of slaves to recover £30,000 damages for the conversion of his property; and bearing in mind the well-settled principle, that the common law requires its suitors to come into court with clean hands, and that no man who makes title through an immoral act can there obtain damages, I ask your Honors to consider whether this decision does not prove that slavery, by the law of England, is not an immoral institution. The case of *Emerson v. Howland*<sup>3</sup> is to the same point. That was an action on a contract based on the right of property in a slave. If the eminent judge who decided that case had deemed slavery an immoral basis on which to rest a contract, he would never have allowed it to be maintained.

<sup>1</sup> 2 Dod. 249.

<sup>2</sup> 10 Wheat. 121.

<sup>3</sup> 1 Mason, 45.

But, whatsoever may be the law of England on this subject, by the law of this Commonwealth slavery is not immoral. By the supreme law of this Commonwealth, slavery is not only recognized as a valid institution, but to a certain extent is incorporated into our own law. Chief Justice Parker<sup>1</sup> says, "The words of the Constitution were used out of delicacy, so as not to offend some in the convention, whose feelings were abhorrent to slavery; but we there entered into an agreement that slaves should be considered as property." This court will hardly declare in this case that slavery is immoral, and that to allow the master to exercise the right claimed would exhibit to our citizens an example pernicious and detestable, when, before you rise from your seats, you may be called upon by the master of a fugitive slave to grant a certificate, under the Constitution, which will put the whole force of the Commonwealth at his disposal, to remove his slave from our territory.

If I have succeeded in convincing the court of the truth of the points which I have made, I have shown that this case is within the general principles of the law of nations; and that it does not come within any exception to those principles, and of course is to be governed by them. I now ask the attention of the court to some authorities which bear more directly on the question before you.

The leading case on this subject is the case of the negro Sommersett.<sup>2</sup> In many of its leading features, it resembles the case at bar. I shall not deny that Sommersett's Case settled the law of England. However contrary it may have been to the opinions of eminent common lawyers of preceding times, and to the general current of opinion and practice at that day, it has been acquiesced in, applauded, confirmed, till it would be folly to deny that the present common law of England in regard to slavery is there to be found. But I think, nevertheless, that much instruction concerning this great case, and much valuable reasoning

<sup>1</sup> 2 Pick. 19.

<sup>2</sup> 20 Howell's State Trials, 20.

upon the subject of it, may be found in the elaborate opinion of Lord Stowell, in the matter of the slave Grace, to which I have already referred. And, though it may not convince us that Sommersett's Case was decided erroneously, it will probably prevent us from being misled by the highly figurative and declamatory language which was indulged in by some of the eminent men concerned in that cause. If the reports of the judgment of Lord Mansfield are even tolerably full and correct, it is much to be regretted that we are not permitted to see a little more fully the grounds on which the court proceeded and the train of reasoning by which they were brought to the decision which they made. The judgment, as reported, is singularly deficient in this respect; and feeling as we do, that it is necessary for us to distinguish the case at bar from Sommersett's Case, we are not a little embarrassed by our ignorance of these grounds and reasons. I have already had occasion to notice one expression made use of by his Lordship in that case, and I have attempted to show that it need not be an insurmountable obstacle here. I will now call the attention of the court to two other principles, being the only principles which I have been able to discover in the opinion.

"Contract for sale of a slave is good here: the sale of a slave is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of the inquiry, which makes a very material difference." With all submission, I must confess that I am unable to perceive the distinction. What is the subject of a contract for the sale of a slave? Is it not the person of the slave? And what is the subject of inquiry, in an action on such contract? Is it not whether the vendor sold to the purchaser the person of the slave? What was the subject of inquiry in the action brought by the owner of slaves against the captain of the British cruiser, and reported in 3 B. & Ald.? Was it not whether

the plaintiff owned the persons of the slaves, and the defendant destroyed his property? How, then, can it be said that the person of the slave comes in question in the one case more than in the other?

“The state of slavery is of such a nature that it is incapable of being introduced on any reasons moral or political, but only by positive law.” And, again, “Slavery is so odious that nothing can be suffered to support it but positive law.” Now, if by positive law is meant a law enacted by the legislative power of the country, this assertion is not true in point of fact; for in all modern States, I believe, with the exception of some of the colonies of Spain, slavery has been introduced by custom, and without any action of the legislative power. Negro slaves were introduced, and held like merchandise or any species of property, because slavery was not forbidden by law, and not because it was required or sanctioned by law.

If by positive law it is meant that there must be some law of the State which at least permits the master to exercise acts of ownership over the slave, this is undoubtedly true. We must find in this case some law which will permit this master to remove the slave, and it must be Massachusetts law too; but the law of Massachusetts, which we expect to find, is that principle which declares that the law of the domicile shall govern, as to the relations between foreigners, except in so far as it contradicts our own policy and laws.

If by positive law is meant a law of the State where the question arises, without reference to the law of the domicile, and that the law of the domicile cannot be in any degree regarded, even where the question arises between strangers, then we deny the position. We say it is not true even in England, and that the cases in which the English courts have recognized the foreigner’s right of property in slaves, and given him damages for a violation of that right of property, prove that it is not the law there.

But the grounds on which we expect to distinguish this case from Sommersett's Case are that the owner of Sommersett was a British subject, resident in Virginia, then a British colony; that the question of national comity did not arise in that case; that none of the considerations which grow out of our close and peculiar relations with the State of Louisiana, there existed; that the public policy of England in respect to her dependent colonies was a very different thing from the public policy of Massachusetts in respect to her sister States; that a citizen of the State of Louisiana has a different standing in our courts, at this day, from the standing of a Virginian in the King's Bench in 1772, just before the breaking out of the Revolutionary War: in short, that Sommersett's Case was decided by an English court, on considerations proper to that country; that this case is to be decided by a Massachusetts court, upon reasons proper to ourselves. And if I have succeeded in convincing the court that it is consistent with the public policy of Massachusetts to permit the master to exercise the right claimed in this case, I think the court can feel no difficulty in distinguishing this case from Sommersett's Case. I know not how I can better illustrate my meaning than by supposing a case. Suppose that slavery had existed in Scotland before the union; that it had become incorporated into all her institutions, civil, political, and domestic; that it was not only of great importance to the Scottish nation, but one in which they felt an intense interest, which transcended even its real importance; that the existence of this institution was one of the chief obstacles to a union of the two kingdoms; that its protection was provided for and guaranteed, and the faith of the English nation pledged thereto, by the act of union; that it was made the basis of taxation and representation in the Imperial Parliament. And then suppose that a Scottish gentleman, travelling into England with his slave, and restraining him for the purpose of carrying him back to Scotland, that slave had been

brought before Lord Mansfield on a writ of habeas corpus. Do your Honors believe that he would have been dismissed from the custody of his master, on the ground that slavery was so odious that the master should not be permitted to carry his slave home, because there was no positive law of Parliament providing for the case? Should we not have heard something of the act of union, of the ultimate relations between the two kingdoms, of the great importance of the institution to the sister kingdom, of the state of feeling there on the subject, of the necessity to preserve amicable feelings and encourage intercourse between the people of the different sides of the border? I submit to your Honors that we should, and that the result would have been different from the result of Sommersett's Case.

I now ask your Honors' attention to some authorities in support of our view of this case.

The case of the Antelope, in 10 Wheaton, has already been referred to. In that case, a Spanish slave-ship was captured on the coast of Africa by a piratical vessel. The slaves were brought by the pirates near the coast of the United States, probably with the intention of smuggling them into some part of our country. The vessel having them on board was seized by a public armed vessel of the United States, and brought in for adjudication. The Spanish owner claimed the slaves, and they were restored to him by the court. Now here was a case in which the slaves came lawfully into the custody of the United States, and without any improper intervention on the part of the public armed vessel. The case seems to have been exactly parallel with the case of a cargo of slaves cast upon our coast by a storm; and yet the court interfered actively to restore them to their foreign owner.

A case was brought before Judge Morris, of Indiana, in 1829, in regard to the slaves of one Sewall, by habeas corpus, the return to which stated that Sewall was emigrating from

Virginia to Missouri, with his family and slaves, and that his route led him through Indiana. But the evidence showed that he was going to settle in Illinois, and intended to run his negroes into Missouri for the purpose of selling them. The decision turned, therefore, on the fact that the party had abandoned his domicile in a State where he could hold slaves, and had not shown even an intention of acquiring a new domicile in another such State; but on the contrary, so far as his intention did appear, it was to settle in a non-slaveholding State. The slaves were accordingly declared free; but the judge expressly intimates that his decision would have been otherwise, if the domicile of the owner had continued to be in a slaveholding State. "By the law of nature and of nations (see Vattel, 160), and the necessary and legal consequences resulting from the civil and political relations subsisting between the citizens as well as the States of this federative republic, I have no doubt but the citizen of a slave State has a right to pass, upon business or pleasure, through any of the States, attended by his slaves or servants; and, while he retains the character and rights of a citizen of a slave State, his right to reclaim his slave would be unquestioned. An escape from the attendance upon the person of his master, while on a journey through a free State, should be considered as an escape from the State where the master had a right of citizenship, and by the laws of which the service of the slave was due. It is not necessary for me to decide whether an emigrant from one slave State to another would have the right of reclaiming his slaves, if they should escape from him while passing through our State, because that is not the case now before me. . . . The emigrant from one State to another might be considered prospectively as the citizen or resident of the State to which he was removing, and should be protected in the enjoyment of those rights he acquired in the State from which he emigrated, and which are recognized and protected by the laws of the State to

92 PROFESSIONAL AND MISCELLANEOUS WRITINGS.

which he is going. But this right, I conceive, cannot be derived from any provision of positive law."<sup>1</sup>

The case in 2 Marshall's Kentucky Reports, which has already been referred to, has an important bearing on this case. I have not the book at hand; but your Honors will find, on referring to it, that it contains a strong and distinct declaration of the opinion of the court in favor of the right claimed by the respondent in this case.

These are the views entertained by the respondent's counsel, concerning this important and interesting question.

<sup>1</sup> 3 American Jurist, 406.

## DEBTS OF THE STATES.

FIRST PUBLISHED IN THE "NORTH AMERICAN REVIEW" FOR  
JANUARY, 1844.<sup>1</sup>

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1. State Stocks and Revenues, comprising Statistical Tables of the Stocks, Debts, Expenditures, and Revenues of each of the United States. New York. 1841. pp. 8.
2. Report of the Joint Committee of the Senate and House of Representatives of the State of Michigan, on the Subject of the Five Million Loan Bonds. February, 1843.
3. Message of Governor McNutt to the Legislature of the State of Mississippi. January, 1841.
4. Message of Governor Porter to the Legislature of the State of Pennsylvania. January, 1843.

THESE documents are connected with a subject of great public importance. Disgrace has fallen upon the people of this country in the eyes of the civilized world, and it becomes us to inquire how far we deserve it, how far it is unmerited, by what means we can justly relieve ourselves from it, and what are to be the consequences of our continuing in the wrong. We believe that some injustice has been done by public opinion, and some needless alarm felt by those most directly interested, either through ignorance of the facts, or because they have been considered only in a hurried and imperfect manner. We have no doubt, also, that evil principles have been disseminated, and false ideas of duty and policy presented to the people, in connection with this interesting subject, and that these can be effectually exposed only by discussion. We propose, therefore, to state the facts, as we

<sup>1</sup> *Ante*, vol. i. p. 99, *et seq.*

## 94 PROFESSIONAL AND MISCELLANEOUS WRITINGS.

suppose they really exist, and to examine some of the principles connected with the subject.

At the beginning of the year 1830, the States of this Union were in debt only for about \$13,000,000. During the next seven years, the greater part of the present debt was contracted; and the State governments laid the foundation for the residue by authorizing loans, and commencing public works upon which the money was to be expended.

These seven years formed one of the most extraordinary financial periods — perhaps the most extraordinary one — the world has ever seen, and nowhere were its character and effects so fully exhibited as in this country. It may not, therefore, prove uninteresting to trace rapidly the causes which led to this remarkable state of things in the United States. Great injustice has been done to the American people by leaving out of view the general state of financial affairs at the time when their debts were contracted, and when some of the States failed to pay the interest which was due.

The peace of 1815 found Europe, and to some extent this country also, exhausted by the wars which were then terminated. Great public debts had been created; population had been kept down by the drain upon it for the armies; production was diminished, and commerce had but a feeble life. The habits and pursuits of the people had so long been formed to a state of war, that time was requisite to allow the general peace of the world to produce its effects. This change, however, soon began to be accomplished, and the world was not slow in obtaining the benefit of the new condition of things. Reverses more or less severe occasionally came, especially that most serious one in England in 1825 and 1826, which was felt in this country also. But, on the whole, the affairs of all commercial and manufacturing countries were in a hopeful state. Wealth was increasing; population was greatly multiplied; production was enlarged still faster than population; and the general condition of man in

most civilized countries was constantly improving. We felt some checks during the period between 1815 and 1829; but they were beneficial rather than injurious, for they tended to keep the country in a sober and calm state, and to make men industrious and economical without seriously impairing their resources. When General Jackson became President in 1829, there was a general and well-grounded belief that the financial affairs of the country were prosperous, and that we were in a condition to go forward with accelerated speed.

In 1834, the last instalment of our public debt was paid. No more money went out of the country through this channel. This was an event of great importance to the country, and certainly its importance was not inadequately estimated either at home or abroad. Here, the party newspapers made the most of it with the people, in order to obtain credit for the preceding administrations which had planned it, and for the existing administration by which it had been accomplished. Abroad, it was considered very striking from its novelty; for we were the first, and are still the only, nation in modern times which has ever wholly freed itself from debt. This fact tended to raise the spirits of the country, to give the people great confidence in their resources, and to incite them to large undertakings.

During this period, our manufactures increased much; and a beneficial change was taking place in an important branch of commerce. Instead of sending little or nothing but specie beyond the Cape of Good Hope, wherewith to purchase agricultural and manufactured products, our own manufactures began not only to supply our own wants to a great extent, but to be carried elsewhere. A new course of trade was thus opened, a good market being provided for the products of our own labor; and the money was kept at home which was formerly sent abroad to buy those of other nations.

At the same time, another important change was taking

place in trade. Under the old system, large amounts of specie were carried to China, to the East Indies, and to South America, for the purchase of cargoes. Much of this same specie sooner or later found its way to London, or to places where it was under the immediate control of the merchants and bankers of that city. It thus performed long and hazardous voyages at great expense and wholly without necessity. The transportation of money in this form, to some extent, is necessary. The laws of trade require it to be carried from one country to another to settle balances of account; and it must go from a place where it is less to one where it is more valuable. But to carry it to the East Indies, and pay it to a merchant there who the next week sends it to London, creates an expense of freight, interest, and insurance, without necessity. This is so plain in principle as to have given rise long ago to the practice and laws of bills of exchange; but it was reserved for the period of which we are now speaking to give the fullest effect to this practice in this country, by establishing in our principal commercial cities agents of merchants and bankers resident in London, with authority to grant letters of credit to a merchant about to send abroad for a cargo. By virtue of such a letter, the master, or supercargo, or some merchant at the port of destination, is authorized to draw bills of exchange on the merchant or banker in London for a specified amount; and with these bills, or their proceeds when sold in the market of the place, the cargo is purchased. The borrowing merchant, on his part, agrees to place funds in London wherewith to meet the bills at maturity. It is obvious that this arrangement, besides saving large risks and expenses, must set free a great amount of capital. If employed only in safe and legitimate transactions, it would release for a considerable period all the capital necessary for them. But its effects did not stop here. At a period when confidence was rising and profits seemed certain, this new arrangement began to be resorted to as a new mode of obtaining means

with which to trade; while at the same time the general confidence and the apparent prosperity made it very easy to obtain bills. Credit to an immense amount was thus created, and our whole commerce felt the stimulating effects of this new cause.

While this change was taking effect, the war between the Government of the United States and the Bank of the United States was carried on. The public deposits were removed from that bank to State banks; and, in anticipation of the time when the charter of that institution would expire, local banks were chartered all over the country. In seven years, from 1830 to 1837, the nominal capital of these banks was increased from one hundred and ten millions of dollars to two hundred and twenty-five millions. Paper money multiplied still faster. This increase had a necessary effect on prices. The ease with which money was obtained, and the apparent profit from its use, led to the multiplication of engagements of all kinds and to every form of speculation, to an amount which, if it could be correctly ascertained, would even now fill us with astonishment.

If we add that, while these causes were in full operation, and were gradually working together to produce their natural effects, some of the States began to receive and expend the great sums of money they had obtained upon loan; and that our own country, in its agriculture and other important resources, had been making a real and great progress, while other countries, and especially England, were in a similar state of excitement, and were constantly reacting on us,—if we add all these circumstances together, we shall have little cause to wonder that the American people were brought into that most extraordinary condition in which their public debts were contracted. Former times may have exhibited as great madness, but it reached fewer persons. At no other period did the wild spirit of adventure become epidemic over so many countries, till it seemed to affect the whole world. At this time, commerce and manufactures had largely in-

creased. Wealth had been both accumulated and diffused to an extent before unknown. Wonderful improvements in the means of communication, across wide seas and through great continents, had brought all civilized and especially all commercial men within one common atmosphere of sentiment and opinion. A long and unbroken peace, in whose sunshine population had increased, and production been stimulated, and private enterprise suffered to act freely, incited men to large undertakings. Some, who in former times would have found occupation suited to their daring tempers in the field, embarked their recklessness in commerce ; others, whose rashness under ordinary circumstances would have been soon checked by disaster or prevented from showing itself by want of means, found that their energy and love of adventure had made them leaders ; and others still, whose fears would have been roused by danger, lost all hesitation in the general confidence. Men acted as if a short and secure road to wealth had been discovered, on which all might travel, and he who went the fastest would be the first to reach the desired end. The result was such a morbid tendency to excess in all financial affairs as had never before been witnessed. In those countries where the currency was bank paper, the quantity of money in circulation was enormously increased. Partly in consequence of this increase and partly on account of the sanguine hopes of men, prices continued to rise. All uses of capital seemed to be followed by certain and large returns, and men were therefore eager to borrow. All pursuits appeared to be safe and prosperous, and therefore those who had money were desirous to lend it. So much security was felt, that little security was asked ; and, to obtain money, nothing more was necessary than to show the lender that it was to be employed in some magnificent scheme, which stood well with the large expectations of the time, and was in season with the glorious summer of men's hopes.

At this same period, and partly in consequence of this

extraordinary state of things, there arose in this country a vehement desire to construct great public works, chiefly such as facilitate and promote internal communication.<sup>1</sup> We do not mean to say that the desire was then new. The people of this country are far too sagacious not to have discovered before that time the great value of such works, and the extraordinary natural opportunities for them presented by this continent. They have not much taste for cathedrals and palaces, but "the useful magnificence of roads and bridges" excites their admiration. They knew well enough that a canal or a railroad, piercing a great tract of country, was of immense importance to them. They quite comprehended its objects, and did not underestimate its effects; and when their hopes had been raised, and their judgment somewhat disordered by the fever in their veins, and they saw the means of accomplishing these great objects not only within reach, but almost thrust into their hands, it is not strange that they seized upon them with incautious eagerness, and expended them with a prodigality somewhat in proportion to the ease with which they were obtained.

We repeat, therefore, that great injustice must be done to the people of this country, if the general state of men's minds and of financial affairs is left out of view in considering the subject of their indebtedness. They have been rash, but it was at a time when rashness was epidemic. They have been improvident, but it was when prudence was generally considered little better than narrow-minded timidity. Their fault may have been very great, but it was very general, and it was a fault of which the creditor largely partook with the debtor. If it was rash and improvident in them to borrow,

<sup>1</sup> It would seem that contracting public debts for such objects was a new thing, for M. Say lays it down as one of his principles that "there is this grand distinction between an individual borrower and a borrowing government, that, in general, the former borrows capital for the purpose of its beneficial employment, the latter for the purpose of barren consumption and expenditure. Nations never borrow but with a view to consume outright."

it was rash and improvident in others to lend ; for, in these cases, the lenders had almost as good means of knowing the grounds of credit as the borrowers had. The borrowers were States, whose resources and means of payment are necessarily made public, so that all may know them. The works on which the money was to be expended were public works ; their character and purposes were known ; and when the loan was obtained for a specific and declared object, which it often was, the reasonableness and the probable results of the undertaking were open to the judgment of all intelligent men. In our opinion, it was the duty of the lender to exercise his judgment on these points. It is reasonable to expect that creditors will not only be vigilant, but suspicious ; for those qualities naturally grow out of the relation of debtor and creditor when it is formed, and they spring up whenever an attempt is made to form it. The fears of creditors, and of those who are asked to become creditors, not seldom lead to untrue judgments and harsh constructions, which are not to be blamed, because they contribute to the general safety. But when we find rashness where we had a right to expect caution, and a blind confidence in place of a careful examination into means and plans, we cannot doubt that the general infatuation must thereby be increased, and that they who have departed so widely from the qualities which usually belong to their position have done much to produce the mischief.

Let us not be misconstrued into saying one word that tends to affect the legal and moral obligation of any contract made under these circumstances. What we have said does not touch that obligation. The parties were competent to make contracts. The borrowers were free States, whose public acts were done by the responsible agents and immediate representatives of the whole people. Of course it is not intended to intimate that such a degree of infatuation might exist as would relieve one of the parties from the obligation of its contracts. This would be to stultify a sov-

reign State,— a process which would certainly be entirely new in the history of public law, and one to which, it is presumed, no State would very willingly submit. Our remarks have no reference to the binding force of the contracts. They are applicable, not to the will to pay, but to the ability to pay. They tend to excuse *insolvency*, not *fraud*. They present some reasons why a people who admit their indebtedness may at the same time, without dishonor, admit their inability to make payment. It is often dangerous to run too close a parallel between public and private duties. The rules for the conduct of States and of individuals are not identical, though it is not always easy to see just where they differ. But in this matter we can perceive no distinction between the case of an upright and well-meaning man who cannot pay his debts, and a State which is in the like predicament. The mere fact of insolvency furnishes no ground for inferring bad faith, or even bad judgment. The circumstances under which the debts were contracted, and especially the inducements which led to them, must be taken into the account before any decision unfavorable to the debtor can justly be made. And, if it is found that a State has been led astray partly by the insane confidence of its creditors, those creditors must bear some of the blame which always attaches to unsuccessful rashness.

There is another fact, which it is important to keep in view. The real prosperity of the States at the time when these debts were contracted, especially when seen under the bright sunshine which then rested upon all things, was a cause, and to a great extent a just cause, of confidence. Their progress in every thing which makes a people great and powerful and rich had been unexampled. Look at their population: in thirty years, it had increased from seven millions to seventeen millions. This increase took place not in a country already overstocked, and where the means of employment and subsistence are constantly sought after by those who are too numerous to be supplied, but in a coun-

try wide enough to afford ample room; fertile to produce the means of subsistence; full of all natural resources to invite and reward enterprise; governed by laws that left the freest scope for the energies of the people. Let it be borne in mind, also, that this people came from that Northern stock which has always been so full of vigor; that they have a hereditary right to energy of character; and that, in this New World, they have been so stimulated by the opportunities and wants of their country as to be incapable of idleness, — finding no satisfaction but in exertion, and no rest, so to speak, but in continual labor.

The results have corresponded to the causes. The domestic produce of the country exported in 1824 was of the value of \$50,000,000; in 1830, it was \$107,000,000. The post-office received and expended in 1837 about \$4,000,000; and in 1830, only \$2,000,000: it carried the mail in 1836 over 32,000,000 of miles of post-roads, though in 1830 it carried them over only 14,500,000 miles, and in 1800 the distance was only about 3,000,000 of miles. Our manufactures had been created, and a great amount of capital had been invested in them. They had been extended till they were capable of supplying nearly all our own wants, and many of those of foreign nations. In some articles, they had reached a point where they were above foreign competition; in others, they were fast approaching it. Regarded at first as hostile to commerce on account of the restrictions which were partly designed to encourage them, they were now beginning to pay the debt which they had owed to foreign trade, by furnishing some of its safest exports.

But these things, important as they are, give only a faint idea of what our people had accomplished. The stories of the old poets concerning heroes who built cities by the shore of the sea, and, by their own mighty energies and the direct assistance of divine power, created States that were secured by laws, supplied by industry, and adorned with

the arts of life, do not sound incredible or strange in our ears. In the lifetime of one generation, we have seen an extent of wilderness that seemed illimitable divided into cultivated farms; solitary inland seas made glad with the presence of an active and prosperous commerce; great rivers, whose waters formerly reflected only the shadows of the forest, running by the luxurious abodes of civilized men, and bearing the varied products of labor; cities, which are already worthy of the name, filled with an industrious and intelligent population, springing up in the solitary places; nay, great States, whose people are reckoned by millions, brought into existence and established during this short period.

What wonder, then, that such a people should have felt confidence in their resources? They knew their means had been sufficient to accomplish things which the rest of the world looked upon as impossible. They knew that the tide of prosperity had been rising so fast, that it had borne every thing along with it. Is it strange that they should have been led astray by hope, and brought into the midst of difficulty by want of caution? Let us, then, be just to ourselves. Let us not sit down under the imputation that no more wisdom was to be expected from a government of the people. We deny that more wisdom was to be expected of *any* government in similar circumstances. Such mistakes are not new. Other governments have done such things before, and with far less excuse.

We do not, however, acquit some of the States of all blame for contracting such great debts. They acted incautiously, and bitterly have they repented of it. But we do maintain that, when the circumstances under which the debts were contracted, and the objects for which the supplies were thus obtained, are fairly examined, those governments will not be found exposed to the severe censure which they have incurred. Being human, they were imperfect. Success is the sole test with common minds. They who are

wiser will look at the causes of failure, and see whether these are such as ought reasonably to have been foreseen.

It is easy for observers to see now that the unnatural state of things which existed in 1835 and 1836 could not long continue. A few sagacious men, so placed as to be able to survey the whole field of commerce, saw this at the time; though we doubt if any one understood, or even conjectured, how extensive the malady was. Even these few began at last to doubt whether they, or all the rest of mankind, were mad. The bubble was so strong, and lasted so well, that it seemed almost impossible that it should be a bubble.

But at last the fixed laws of trade began to produce their long deferred but necessary effects. Contracts of all kinds had multiplied to such an extent that a great deal of money was wanted to fulfil them. Prices were so high that much more money was needed to effect the transfer of property than in the ordinary state of the market. In the midst of the greatest apparent prosperity there was a great demand for money. The supply had increased enormously, but it was not sufficient. The banks did their utmost, but they could not keep up to the demand. Money became scarcer and dearer. There was now a choice among borrowers, and a discrimination between those whose credit rested on something and those whose credit had no solid support. It was difficult for any one to get money. Many could not get it at all, and failures began to take place. The process went on, and confidence fell lower, and failures were multiplied daily.

It may here be remarked that, if the Bank of England had curtailed its issues early in 1836, a check would have been felt, which would probably have gradually reduced our headlong speed, and prevented the great calamity of a failure of all our banks. The managers of that bank certainly had the means of knowing that prices both in England and the United States — and especially in the latter country —

were inflated most unnaturally ; that fictitious credit to an immense amount had been created, and was constantly increasing ; that speculative engagements were enormously multiplied, and that there was a constant drain of specie from Great Britain. Notwithstanding all this, the bank continued to extend its engagements until August, 1836, when, finding its specie slipping rapidly away, it began to fear for its own safety. Still, its course was rather vacillating for several months, until it finally gave a decisive blow by stopping the credit and cutting off the facilities of several of the American banking-houses in London. These banking-houses were therefore obliged to call on our merchants for immediate payment, and our merchants required specie from the banks wherewith to make payments. At that moment, no ordinary supply of specie could have prevented a suspension of payment by the banks. The immediate issue of more than a million sterling of bonds of the Bank of the United States of Pennsylvania, designed to serve as remittances, had no perceptible effect. There was very little real exchange to meet the great and pressing want. Exchange based on credit had ceased to exist : nothing remained but to send specie, and of course it could not be obtained in the great sums which were needed, without causing all the banks sooner or later to fail.

But it should be remembered that this suspension took place, not in a state of exhaustion, but after years of unexampled gains, and after the country had made real and great advances in all its permanent sources of wealth. The fearful rate at which we had been moving rendered some check inevitable ; but we had been all the time moving onward, and mainly in the right direction. The check was sudden and violent. It stopped us short, and we stood still. For some months, all the energies of the country were employed in liquidating and paying debts. It is speaking within bounds to say that within a few months engagements amounting to many hundreds of millions were

paid off. Imports almost ceased, our crops went to market, specie flowed in, and at the end of the year 1837 our foreign commercial debt was nearly paid.

The country was then in a condition to resume the payment of specie through its banks. But the United States Bank of Pennsylvania, and some other great institutions, were not ready. During the years of high prices, they had lent their capital on paper which rested only on the exaggerated and unreal values of that period; and an immediate return to specie payments would have shown that their capital had been very seriously impaired. The United States Bank of Pennsylvania, therefore, at first opposed the resumption of specie payments; and subsequently, when compelled to come into the arrangement, it seems to have adopted the bold measure of attempting to bring back the unnatural state of things which had existed before May, 1837; hoping that, by means of high prices and unlimited credit, it might be able gradually to withdraw itself from its dangerous position. It entered largely into the purchase of State stocks, speculations in cotton, and other transactions. It was impossible in the nature of things that this scheme should succeed; but it had some effect. Many began to think that the reverses of 1837 were small affairs, and that they were already overcome; that the disease was cured, and the patient restored to a sound state and ready for action. Our foreign commercial debt had been paid with so much promptness, that European capitalists formed a very high opinion both of our resources and our honor, and they took the stocks of the States as freely as if they had been gold and silver.

But the day of calamity was again at hand. The Bank of England again found itself in a critical condition. Money became scarce, beyond all precedent, in England; prices fell; stocks were unsalable; the Bank of the United States of Pennsylvania again stopped payment, and its example was followed by every bank south of Philadelphia.

Men's eyes were at last opened. They saw that the country had not recovered from the effects of the years of speculation, and that the attempts to return to a false position had but increased their difficulties. A panic succeeded. All property seemed for a time to have lost its value. These were necessary results of the former distempered state of affairs, and this depression was the only method by which a sound condition of things could be produced. But it was a severe operation.

In some of the new States, it was difficult even for the wealthy to obtain money for the daily uses of life. We have heard of farmers, owning large and well-stocked farms, who could hardly get money enough to pay the postage on a letter. They had scarcely any currency, and most of that which they had was bad. In the commercial States, matters were but little better. Failures were almost innumerable. Trade had fallen off, and when prosecuted was hazardous. A deep gloom settled upon men's minds. Governments felt it as much as individuals. Their ordinary resources were diminished. Their means of obtaining extraordinary supplies were lessened in proportion to the general distress. The physical means of making payment of their debts were wanting in some States, for there was no money to be had. The people were amazed at the extent of their own disasters, and afraid to act in any way lest they should run into new mistakes. It was in such a posture of affairs that some of the States, to which we shall more particularly refer, refused, and others omitted, to provide for the interest which had become payable on their debts.

The first of these cases which we shall notice is that of Pennsylvania. On the first of August, 1842, the interest on its funded debt became due, and was not paid. It having been foreseen that there would be no money in the treasury with which to meet the dividend, — amounting to eight hundred and seventy-one thousand dollars, — an act was passed by the legislature, directing the treasurer to borrow

the sum necessary for its payment, and, in the event of his being unable to obtain it on the terms proposed, authorizing the issue of certificates to the persons entitled to dividends of interest, for the sums due to them, payable in August, 1843, with interest at the rate of six per cent. A law was subsequently passed, authorizing the issue of certificates in payment of the two succeeding dividends, bearing interest at the rate of six per cent per annum, and redeemable in August, 1846. These certificates, with the interest which has accrued upon them, are yet unpaid.

The whole amount of the funded debt of this State on the first of January, 1843, was \$37,937,788.24, payable at different periods, and in different sums, the last of which will fall due in the year 1870.<sup>1</sup> The internal improvements, for the construction of which the great bulk of the debt is due, consist of seven hundred and ninety-three miles of railways and canals which are completed, and one hundred and forty miles of canals in progress and nearly completed in January last. The principal work, or rather chain of works, is that between Philadelphia and Pittsburg, extending nearly the whole length of the State, — a distance of three hundred and ninety-five miles, — and connecting the Atlantic with the Ohio River and the great Western waters.

<sup>1</sup> This debt was contracted for the following purposes: —

For canals and railways . . . . .	\$30,533,629.15
To pay interest on the public debt . . . . .	4,410,135.03
For the use of the treasury . . . . .	1,571,689.00
Turnpike, State roads, &c. . . . .	930,000.00
Union Canal . . . . .	200,000.00
Eastern Penitentiary . . . . .	120,000.00
Franklin Railroad . . . . .	100,000.00
Pennsylvania and Ohio Canal . . . . .	50,000.00
Insane Asylum . . . . .	22,335.06

\$37,937,788.24

To this may now be added the amount of certificates authorized to be issued in payment of the last two semi-annual dividends of interest, amounting to . . . \$1,787,454.89

Making a total of . . . . . \$39,725,243.13

These are the objects on which far the greatest part of the money borrowed by the State has been expended. It is manifest that such works must be highly important and useful to Pennsylvania, independently of the revenues which they may yield. From various causes, which our limits do not permit us to notice, these revenues have thus far disappointed the expectations of the people. But the Governor presented to the legislature in January last a very encouraging account of the income from the works during the year then just elapsed; and facts may be cited which go far to prove that the profit which the State will hereafter derive from them must be very great.

Pennsylvania contains 1,724,000 free people, inhabiting a territory of 47,000 square miles. The soil is generally fertile, and, being under good cultivation, the amount of its agricultural products is very great. Their annual value was estimated in 1842 to be \$126,620,617. The manufactures during the same period, including iron, were estimated at upwards of \$64,000,000. The coal mined in the State during the same time was worth about \$9,000,000. It appears, then, that the annual products of the State amount to the enormous value of \$200,000,000. The annual charge upon the State for the interest upon its debts is, in round numbers, \$2,000,000. Suppose the public works were to yield no revenue at all, and the whole of this charge were to fall on the people in a direct tax: it is only one per cent on their annual products. A capitation tax of one dollar a head would nearly pay it. Of course, no burden of debt can be pronounced heavy or light except by comparing it with the resources and means of the debtor, and such a comparison will show that Pennsylvania is not heavily burdened. Her vast and easily wrought mines of the best kinds of coal, lying side by side with inexhaustible treasures of the richest iron ore; her abundant supply of water-power; her fertile soil, temperate climate, and industrious and frugal population,—are resources so immense that even her great debt

appears but a light incumbrance. There cannot be the smallest doubt that she is able, without the least embarrassment, to fulfil all her engagements. It is a lamentable fact that she has not done so; but there has been a concurrence of causes to produce this result, most of which have no connection with the honesty of her people. We deny that any man has the right to say that Pennsylvania has acted fraudulently. Mistakes in judgment have been committed, and we are sorry to add that there has been some remissness of conduct. There has also been clearly shown a disposition to do right. The measures taken by the legislature to raise the necessary revenue, under the peculiar circumstances of the times, have proved insufficient; but they were adopted for that purpose, and were such as not fairly to be open to the charge of being mere pretences. Besides raising more than \$300,000 for the support of the schools, the ordinary expenses of the government are fully provided for by taxes of some years' standing. In addition to these, which are indirect taxes, the legislature voted a direct tax of one mill upon every dollar of taxable property in the State; and by a law passed in 1842, which was designed to go into effect in 1843, this tax was doubled. The produce of the first-mentioned tax of one mill was about half a million of dollars; and if another half million were raised by the law last mentioned, as the legislature designed to do, the sum, together with the revenue actually realized from the public works, would pay about nine tenths of the interest on the funded debt. But there was some ambiguity in the law; and in some counties advantage was taken of the doubt thus created to avoid payment of the tax. This is one of the embarrassments in the details of a law which often occur in practice; but it will undoubtedly be remedied by further legislation. The State has also had a large unfunded debt, due chiefly to contractors on the public works; and to the payment of this sum the revenues of the State have been applied. We understand that this unfunded

debt is now paid, and that for the future the revenues from direct taxation and the public works will be applicable to the payment of the interest on the State stock. We have already said that they will be sufficient to pay about nine tenths of it; and, if the income from the public works should not increase, it will only be needful to provide for the arrears of interest since August, 1842, and for the remaining tenth part of the interest hereafter to accrue. Those who know Pennsylvania entertain no great doubt respecting her future course; and the moment the State shows a determination to pay punctually, there will not be the smallest difficulty in obtaining by a permanent loan the means of paying the arrears of interest.

Maryland is another delinquent State, which has failed during the last two years to make payment of the interest on her public debt. The bonds of this State which have been issued amount to a little more than \$15,000,000; but of these about \$3,175,000, issued to the Baltimore and Ohio Railroad, have not been negotiated; and, should they be negotiated, the interest on them will be paid by the company. Of the residue, nearly \$1,300,000 are the property of the State, having been purchased by the income of the sinking fund. These bonds are subject to different rates of interest, the greater part being at five per cent, and the whole interest, after deducting what goes to the sinking fund, amounting to something less than \$600,000 a year.

The whole of this debt, with the exception of \$215,947, was contracted for purposes of internal improvement, partly by subscriptions to stock in canal and railroad companies on account of the State, and partly by grants in the form of loans to such companies, they being bound to pay the interest on the bonds, and ultimately to repay the principal; the works of the said companies being mortgaged for the security of the respective debts. In making these large advances and entering into these engagements, the legislature of the State relied upon the income of the works to

meet the interest of the debt. In this expectation they have been disappointed. The Baltimore and Ohio Railroad alone has made an adequate return for the expenditure. The sum of \$1,022,000, invested in the stocks of this railroad, earns an income of seven per cent per annum. The sum of \$2,232,000, invested in the bonds and stock of the Baltimore and Susquehannah Railroad, has made some small return, and there is a prospect that the income from this source will slightly increase. On \$1,000,000, loaned to the Susquehannah Tide-water Canal, no return has yet been received; but it is confidently anticipated that this canal will shortly be able to pay the interest on the loan, amounting to \$55,000 per annum. The largest investments have been made in the stocks and bonds of the Chesapeake and Ohio Canal Company. This canal being yet unfinished, and requiring a farther sum of a million and a half or two millions of dollars to complete it, no income is expected from it until the means shall be found to raise that sum, and extend the canal to the coal-mines near Cumberland. Some smaller advances, which have been made to other companies, are not expected to make any return. The annual income, therefore, which can be for the present anticipated from the public works, is limited to about \$150,000. The residue of the interest, amounting to about \$450,000, must therefore be met by taxation. A direct tax, sufficient for this object, was voted by the legislature; but, in consequence of the severe embarrassments of the last three years, and of the want of a proper system for the collection of direct taxes, a large proportion of the taxes for the years 1841, 1842, and 1843 has been suffered to fall in arrear, and in consequence the means of the treasury have been inadequate to the payment of the interest on the debt. From January, 1842, this interest has not been paid, except that for some part coupons have been issued, promising payment at a future day, and receivable in payment of taxes. For the restoration of the credit of the State, it is necessary

that the arrears of interest should be provided for, which can be done in the manner spoken of in the case of Pennsylvania, and by enforcing a more prompt payment of taxes. The taxes already levied appear to be fully sufficient for this object, if collected. Maryland has other revenues, independent of the direct taxes, amply sufficient for meeting all the other expenditures of the State. These taxes, to nearly the whole amount now levied, will be necessary to pay the interest on the debt until an income shall be derived from the large investments in the loans or stocks of the Chesapeake and Ohio Canal and Susquehannah Railroad, and for this purpose these taxes must be enforced. As levied by the legislature, they amount to twenty-five cents upon every hundred dollars of taxable property in the State. We do not say this is a trifling burden. It requires resolution to sustain it. But the case presents every motive which can operate upon the minds of honorable men to induce them to make the effort. The money was borrowed by *their* agents. It has been expended upon *their* soil. Its results thus far may not be such as they desire; but for this their own agents, and they themselves, who selected those agents, and from year to year sanctioned their proceedings, are alone to be blamed. The debt is a just debt. They *can* and they *will* pay it. We look upon the position and future conduct of this State as of the greatest importance to the honor, the credit, and the future reputation of the whole country. It occupies a position, and is placed in circumstances which render its action almost decisive of the fate of this great question of public morals. Pennsylvania can pay almost without an effort. Her debt is really nothing compared with her resources. Indiana and Illinois are differently situated, and at present cannot pay. Maryland occupies an intermediate position. She *can* pay, but it costs her a strong effort to do so. Her condition is such as to try her sense of honor. Hers is the opportunity to settle the question whether a popular government is too selfish to be just. Her

people have it in their power to say to the world: "We are capable of governing ourselves, for we can make sacrifices for the sake of duty and honor: no human power can force them upon us, but we freely make them. We owe allegiance neither to kings, nor princes, nor any earthly potentate; but we obey His will who created us, and we are governed by His laws. Freely and cheerfully, because we know it to be our duty, will we do this thing." Let the people of Maryland remember also that, if they make this effort, they will transmit to their children the inheritance of an untarnished honor; that they will lay the foundations of public prosperity deep and strong in the public faith; that the sacrifices which they are now called upon to make cannot long be necessary, and will grow less with the increase of population and wealth and the rising income from the public works. That they may see these things, and act as if they saw them, is the earnest wish of many who love their country, and think that its honor and welfare are deeply involved in the issue.

The miserable sophistry — for we can call it by no better name — with which some have attempted to delude the people of Maryland into a belief that their legislature had not the constitutional power to contract these debts would not be worthy of a moment's attention, if the subject on which it is employed were not of such importance. There is an article in the Bill of Rights of this State of the following tenor: "Every person in the State ought to contribute his proportion of public taxes for the support of government, according to his actual worth in real and personal property." The argument is that the legislature has power to tax the people *only* "for the support of government;" that the construction of railroads and canals is not one of the legitimate objects of government, and therefore it is not within the constitutional power of the legislature to tax the people to make or pay for them.

We can hardly call this an ingenious argument, for in

genuity would certainly have devised something which should have the appearance of truth; but here is involved so palpable a falsehood that it is difficult to believe it could ever impose on anybody. Not one of the legitimate objects of government to build railways and canals! How is this question to be settled? First of all, by the universal practice of all civilized governments. That which every civilized people, under every form of administration, has caused its government to do, may well be thought to be within the legitimate powers of a government. And what people has ever doubted that the building of roads and bridges was a subject not only fit for the action of government, but necessarily under its exclusive control? Have the people of Maryland ever doubted this? Let them consult their own statutes and ordinances, and see whether, from the first moment when they acted in a political capacity, this subject has not always been ranked among the powers which the government has exercised. Not only has this been the universal practice, but it is absolutely requisite that the practice should continue. Keeping open the means of communication between one part of the territory of a State and another, and affording facilities of passage for persons and property over land by means of convenient roads, and over the waters by means of bridges and ferries, is absolutely necessary. Hardly any object of civil society can be accomplished without them, and the right of eminent domain not only always has been, but always must be, exercised for this end. It has been seriously doubted whether a government acts wisely in delegating this power to private corporations, even where they are held in check by the legislature; but we never heard it suggested that a government could delegate this power without first possessing it. It is very clear, therefore, that these objectors would never have a road made, or a bridge built, or a ferry established, or a canal dug, within the limits of their State: not by the government, for it is not within the powers delegated to the State;

not by those authorized by the government, for the administration certainly cannot empower a corporation or an individual to take land and other private property for a purpose which the government itself has not a right to effect. We suppose no one will be so hardy as to attempt to make a distinction between a ferry and a canal, or a bridge and a railroad. The power of States over this subject arises from the nature of the object to be accomplished, which is to effect an easy, cheap, and safe passage; and of course it is restricted to no particular means.

The truth is the whole argument betrays lamentable ignorance of the nature and objects of all social institutions, or it betrays something worse. The first object of government undoubtedly is to secure its citizens from violence and wrong. But this by no means exhausts its powers or fulfils its duties. It may do much towards the increase of knowledge, the advancement of education both religious and secular, the progress of the sciences, the promotion of a free intercourse between communities and nations, and the increase and diffusion of wealth and comfort; and what it can do towards these objects, securely and wisely, it is bound to do. This duty has been felt by all governments, and to some extent has been performed by all. Great public works, designed for the common benefit and executed by the combined power of the whole people, have always been looked upon as monuments of civilization, and of the wisdom and virtue of the administration which planned them. It is now for the first time denied that they are within its legitimate powers.

Of course we do not here refer to the national government. The question whether the Constitution of the United States gives the power to construct roads within the States is an open and difficult one; but it has nothing to do with the subject here discussed. It turns not on the general question whether such works are legitimate objects for the action of government, but on the question whether this

power is granted in the Constitution of the United States. The question in Maryland is exactly the opposite; namely, Has this power been taken away from the legislature by the Bill of Rights? It must exist, unless it was abrogated by the article we have already quoted.

The word *repudiation*, in the sense in which it is now commonly used, was first adopted in the State of Mississippi. It occurred for the first time, we believe, in the message of the Governor to the legislature of that State in January, 1841, in which he adverts to the plan of "repudiating the sale of certain of the State bonds, on account of fraud and illegality." The material facts in reference to the action of this State upon the subject of its debt are these. In 1838 the State chartered the Mississippi Union Bank, and, in order to provide capital for the institution, it was enacted in the charter that the directors might borrow \$15,500,000; and that the Governor might issue seven thousand five hundred bonds for \$2,000 each, bearing five per cent interest, and redeemable in twelve, eighteen, and twenty years, and deliver them to the officers of that institution from time to time, in proportion to the amounts subscribed for bank stock, the price of which was to be secured to the satisfaction of the directors. The bonds were made negotiable by the indorsement of the president and cashier of the bank. By an additional act, the Governor was authorized to subscribe in behalf of the State for \$5,000,000 of the stock of the bank, and he did so. In June, 1838, he delivered to the bank two thousand five hundred bonds, amounting to \$5,000,000, payable in twelve and twenty years from the fifth day of February, 1838, and bearing five per cent interest from their date. The charter required the bank to appoint three commissioners for the sale of the bonds, and imposed this restriction on their authority, that the bonds should not be sold under their par value. On the 18th of August, 1838, the commissioners sold all the bonds to Mr. Biddle for the sum of \$5,000,000, payable in five

equal instalments, of one million each, on the first day of November, 1838, and the first days of January, March, May, and July, 1839, without interest. This money was punctually paid to the bank, which went into operation, and before January, 1841, lost all its capital.

Now we feel constrained to say that, if this matter had rested here, the State of Mississippi would not be legally bound to pay this debt. We think the commissioners did not conform to their authority in making the sale. They were in terms prohibited from selling the bonds under their par value. The par value of a bond is the amount which is due upon it; and this includes interest as well as principal. This seems to us to be the fair meaning of the words of the charter, and any other construction would render the restriction itself nugatory; since, by allowing the interest to accumulate long enough, the commissioners would have had it in their power to obtain \$5,000,000 for the bonds, though at the very moment when they sold them \$7,000,000 might be due upon them. They made such a sale as not to receive in cash an amount equal to the liability of the State on the bonds, and therefore we believe that they exceeded their authority. We think also that the State had the legal right to insist at a proper time on this want of authority, even against the subsequent purchasers of these bonds; because any one who takes a title through an agent is bound by law to look to the authority delegated to him, and to see that he acts or has acted within its scope in making the title.

But we need hardly say that the question whether a sovereign State shall avail itself of its legal rights depends upon considerations quite distinct from the mere rights themselves. Rules of jurisprudence are necessarily general; and, being general, they may, and sometimes do, work some injustice. A State, like an individual, ought to place itself quite above these general rules, and consider only the justice of the particular case. It is due to its own dignity, to the magnitude of the case, to the importance of preserving the

great fountain of power and justice pure, that the most enlarged and liberal rules of equity should be observed. It is due to its position, being both a party in interest and a judge, to venture on no decision which will admit of question. And so the State of Mississippi must have thought, for so it acted.

In responding to the message of the Governor in January, 1841, the legislature resolved, —

“ *First*, That the State of Mississippi is bound to the holders of the bonds of the State, sold on account of the bank, for the amount of the principal and interest.

“ *Secondly*, That the State of Mississippi will pay her bonds and preserve her faith inviolate.

“ *Thirdly*, That the insinuation that the State of Mississippi would repudiate her bonds and violate her plighted faith is a calumny upon the justice, honor, and dignity of the State.”

These resolves are such as might be expected from the legislature of a free State under such circumstances; for a fact which we have not yet stated was known to that legislature, and in our judgment is sufficient to settle the question. The legislature met in 1839 for the first time after the sale of the bonds. Only one fourth of the purchase money had then been paid over to the bank. The facts were communicated by the Governor to the legislature, and they resolved: “ That the sale of the bonds was highly advantageous to the State and the bank, and in accordance with the injunctions of the charter, reflecting the highest credit on the commissioners, and bringing timely aid to an embarrassed community.” The next legislature, which assembled in 1840, appointed a committee on the affairs of the bank, but uttered not one word respecting the sale of the bonds.

But the constitution of Mississippi contains a provision that no law shall be passed to raise a loan of money upon the credit of the State for the payment or redemption of any loan or debt, unless it be sanctioned by a majority of each house, the yeas and nays being entered on the journals; and

be then referred to the next legislature, public notice whereof is to be given in the newspapers three months before the election, and unless then passed by a majority in each branch of this second legislature. Upon the ground that the State was not originally bound to pay this debt, and that the illegal acts of their agents had not been ratified by two successive legislatures, after public notice in the newspapers, Governor McNutt made his appeal to the people of the State; and in 1842 a majority of the members of both branches of the legislature were found to be in favor of repudiation.

But although a majority of the people of Mississippi seem to have formed at that time an erroneous opinion on this question, and although we think meanly enough of the honesty of their advisers, we should not hastily adopt the conclusion that the majority are hopelessly in the wrong. There has been from the first a large body of intelligent and honorable men in that State who determined to do their duty upon this great question, and they are now manfully engaged in the work. They have exhibited deep legal learning, sound logic, a clear perception of the great principles of justice and duty, and a calm determination which must and will prevail in the contest.. It may not be during this year or the next, but it appears to us certain that the people of this State will see the truth and act in accordance with it. Sufficient allowance has not always been made for the peculiar circumstances of the case. An intelligent foreigner, who feels a just indignation when he hears of repudiation, probably knows the difference between a Highland chieftain and a London merchant, but is profoundly ignorant that differences quite as great exist between the people of Mississippi and the people of Massachusetts. Probably there are few points in which these differences would be so likely to be exhibited as upon this matter of paying debts. To pay debts punctually is the point of honor among all commercial people. But the planters of Missis-

sippi do not so esteem it. They do not feel the importance of an exact conformity to contracts. It has not been their habit to meet their engagements on the very day, if not quite convenient. Certainly they attach no idea of dishonesty to such a course of dealing. They mean to pay, but they did not expect, when they contracted the debt, to distress themselves about the payment. If a friend wants a thousand dollars for a loan or a gift, he can have it, though perhaps a creditor wants it also. We do not mean to intimate that there are no high qualities in such a character; but they are different from those which make good bankers and merchants, and therefore bankers and merchants ought not to expect such men to look at a debt just as they do. In time they will see the substance of the matter and act accordingly. Convince them that their State is now pursuing an arbitrary, unfair, and oppressive course of conduct, and they will take care that it is pursued no longer. They have been in great pecuniary distress. Their condition has been so bad that they have looked upon a creditor demanding payment of his debt as little better than an enemy, and to be treated accordingly. They have seen that the institution which had the proceeds of these bonds was managed as if it had been a gambling-house. They have been told by those in whom they had been accustomed to put confidence that the sale of these bonds was a part of the same nefarious course of conduct which ruined the bank, and that, if they should pay the debt, they must do it for the benefit of those who defrauded the State in making the purchase of the bonds. We may deeply regret that they acted in conformity with these views. We may believe that the conduct of the State has been unwise and unfair; that it has shown any thing but that dignified caution, and that clear perception of the great principles of justice, equity, and clemency, which a sovereign State should always exhibit in its dealings with individuals, especially where it is both party and judge. But let us not show the same want of moderation by running into extremes

ourselves; let us not exhibit the same want of charity by believing that a majority of the people of that State are knaves. Their affairs are now improving. The people are recovering from the sore and irritable state into which they had fallen. Allow time for them to see the truth, which the high-minded men of that State know so well how to exhibit and enforce, and we shall find that, though the people may sometimes make a great mistake, they mean to do right, and they will discover and correct the error.

The State of Michigan has denied its obligation to pay a part of its outstanding bonds. The material facts are that, by an act of the legislature of that State passed on the 21st of March, 1837, amended by another act passed on the 15th of November in the same year, the Governor was authorized to negotiate for a loan of five millions of dollars, which was to be expended on the public works. Under this authority, the Governor, on the 1st of June, 1838, entered into a contract with the Morris Canal and Banking Company of the city of New York, by which he constituted that company the agents of the State to make sales of the five millions loan. The power of the Governor to enter into this contract with the Banking Company has not been questioned. Acting under this agency, the Banking Company, before the 15th of November, 1838, sold to various persons bonds amounting to \$1,187,000, and duly paid over to the State the proceeds of those sales. On the first day of July, 1841, the interest on the bonds so sold became payable, and, the State not having made provision for its payment, it remained unpaid. Reasons for this default were assigned by the legislature at a subsequent period, which seem to us to be well-founded and to afford sufficient excuse for it; but our limits will not permit us to examine or even to state them. Suffice it to say that, in February, 1843, the legislature took the subject into consideration, declared that the State was "legally and equitably bound to provide for the payment of the principal and interest of these bonds," covenanted with

the holders to fund the interest till July, 1845 pledged the revenue from the public works to the payment of the interest which should accrue after that time, and voted a direct tax to be assessed and levied in the same manner as the other State taxes, in order to pay any deficiency of the interest which that revenue might fail to meet. Thus far the conduct of the State has been such as the country had a right to expect.

We wish it were in our power to approve of its conduct in respect to the residue of this loan, the history of which is briefly as follows. The Morris Canal and Banking Company met with great difficulties in the sale of the residue of these bonds; and being called on by the Governor in November, 1838, to state the account of their sales, and to make such suggestions as they should think important concerning future proceedings, replied by a proposal to pass the whole amount of the bonds at par, after deducting their commission as agents, to the credit of the State of Michigan: provided the Governor would deliver to the Banking Company the whole of the bonds at once, and take the obligation of the United States Bank of Pennsylvania to pay three fourths, and of the Morris Canal and Banking Company to pay one fourth of the amount, at certain periods which had been fixed in the contract of agency before mentioned. To this proposal, the Governor replied that he had no objection to the details; that their contract of agency gave them full powers to act as the interest of the State required, and that they must take the responsibility of deciding whether this was the best thing that could be done for the interest of the State. The Banking Company say in answer that they think it is best for the State to accept the offer which had been made, and that they have closed the bargain. The Governor afterwards delivered the bonds, took the obligations of the United States Bank of Pennsylvania and the Morris Canal and Banking Company for the price, and in his next message announced the sale to the legislature,

and communicated to them the documents respecting it. The legislature interposed no objection. Subsequently, the State received from the purchasers about \$1,000,000, in part payment of their obligations ; and then the United States Bank of Pennsylvania and the Morris Canal and Banking Company having both become insolvent, and having failed to pay the balance of the purchase-money, the State declared that it owed upon these bonds so much as the purchasers had paid, and that it was ready to issue new bonds for that amount upon the surrender of all the bonds so sold, and that as to the residue "it was a transaction between the State and the purchasers, and their agreements are to be judged of by the circumstances attending them."

It only remains to add that these bonds, all of which went to the United States Bank of Pennsylvania, were pledged by that bank to various banking houses in Europe to secure money previously borrowed, money advanced at the time of making the pledges, and subsequently paid on the faith of the pledges ; that the bonds are, in form and by law, negotiable ; and that no evidence has ever appeared, so far as we know, that either of those banking houses had knowledge at the time they took the bonds, or when they afterwards advanced money upon them, of any defect in the title of the United States Bank of Pennsylvania.

Now we should agree at once that, if the United States Bank of Pennsylvania and the Morris Canal and Banking Company held these bonds, the State might justly refuse to consider any greater amount of them as due than had been paid for. The law of all civilized countries would in some way come to this result. But every system of law with which we have any acquaintance, and certainly the law of Michigan, makes a distinction between the case of these banks and that of *bona fide* purchasers. We believe the principle to be universally admitted that, whenever a purchaser of property acquires a title from the seller which he can transmit although that title be tainted with fraud, if he

sells to a *bona fide* purchaser who parts with his money or any other thing of value on the faith of the property, such purchaser obtains a valid title purged of the fraud. This principle is not only well established, but society could hardly get along without it; and it is most often and most liberally applied to the sales and transfers of negotiable securities. That the United States Bank of Pennsylvania had a title which it could transmit does not admit of a doubt. The sale negotiated by the Morris Canal and Banking Company might have been open to some objection, as they were themselves the agents to sell, and seem to have been in some way interested in the purchase; but surely it is too late to object, after the Governor, who was the immediately authorized agent of the State, had, with a knowledge of all the facts, ratified the contract and delivered the bonds, and after the legislature, with all the facts before them, had interposed no objection, and had taken one third of the purchase-money. The only possible question therefore is whether the European bankers parted with their money in good faith; and we are not aware of any evidence to the contrary. The legislature do not assert that these bankers had notice, either actual or constructive, of any fact which would deprive them of the protection due to all *bona fide* purchasers of negotiable securities. The mere fact that the bonds had not been paid for, even if known to the persons to whom they were pledged, would not have this effect. It would be monstrous to say that, because property bought on credit has not been paid for, the holder cannot give a good title to it. Such a doctrine would overset half the sales made in the country. But we repeat we have never seen any evidence or any reason to believe that even this fact was known to the foreign bankers. To do the legislature justice, both by their committee and by the act relating to this subject, they preserve a silence which is dignified and proper, if they have no satisfactory evidence of such notice, but believe that inquiries made afterwards may possibly

elicit it. And this we understand to be their position. But even without such evidence we cannot doubt the equitable and legal claim of the holders of these bonds to be paid what is due on them to the extent of the amount for which they were pledged. And we add that we entertain as little doubt that the State of Michigan will hereafter act according to this view of the subject, and adopt in reference to these bonds the same just and honorable measures which it has already taken concerning the others.

The State of Louisiana has loaned its credit to several banking corporations the capital stock of which was secured by mortgages on real estate. The bonds issued by this State amount to about \$22,000,000, of which about \$17,000,000 have been sold. They are all payable in England. The immense trade of New Orleans, the port of entry and export for the great valley of the Mississippi and all its tributary waters, has for a long time caused capital to be in great demand there; and this method of obtaining it by means of loans to banks whose stock is secured by mortgages of real estate was devised about twenty years ago. These banks were well managed, and from their profits a fund was accumulating, which before the maturity of the bonds would have been sufficient to redeem them.

But unfortunately New Orleans partook quite as much as any other city, and probably more than any other, of the unnatural excitement of the times, and felt more than any other the corresponding depression which followed. During the period of prosperity, cotton, the great staple, bore very high prices; property of all kinds was held at values merely factitious; and, confidence being great and credit being easily obtained, the banks discounted an immense amount of paper, which was found to be bad when the day of trial came. The consequence has been that the resources of the banks have been very much diminished, and the assets of one or more of them may not be sufficient to pay the bonds loaned to them by the State. We do not think

the deficit will be large. Our limits do not allow us to state their condition particularly: suffice it to say that, if they are judiciously managed, we believe they can pay so large an amount of the bonds loaned to them as to leave only a small sum to be paid by the State.

In no part of the United States are there men of higher honor and greater intelligence respecting financial affairs than in Louisiana. Nowhere is the necessity of preserving the public faith inviolate better known or more strongly felt. The State is gradually but securely rising from her great pecuniary difficulties; property is attaining its just and safe value; capital is again increasing rapidly, and almost before the people are aware of it they will again be in a prosperous condition. It is a high and clear duty of the people of this State to watch vigilantly over their crippled banks; to see that their assets are honestly applied to the payment of the bonds; and to adopt such legislative measures as shall secure and preserve the faith of the State towards its creditors, and procure for themselves again the use of the foreign capital which they so much need.

We regret that there should be any thing in the legislation of Louisiana upon this subject to require comment; but we feel bound to say that an act passed at the last session of the legislature, in reference to the liquidation of the affairs of some of the banks, is open to very serious objection. The act we refer to was passed on the 5th of April, 1843, and provides that all debts due to the banks in question may be paid in State bonds issued by the banks, which bonds are to be received in payment at par. It must be borne in mind that the capital stock of these banks consisted of the obligations of those who subscribed for the stock to pay the sums for which they subscribed, secured by mortgages on real estate; and, before these bonds were issued, it was provided by law that these obligations of the stockholders, together with the mortgages by which they were secured, should be deposited in the offices of the banks for safe-keep-

ing, and as a guaranty for the reimbursement of the principal and interest of the bonds to be issued by the State ; and that all the hypothecary obligations of whatever nature, subscribed by individuals in favor of the banks, should stand as collateral security for the payment of the money loaned on the bonds of the State, and the interest which should accrue thereon. Now there is not the smallest doubt that this law amounted to a contract made by the State and the banks with every bondholder, that these mortgages should be held by the banks in trust, to secure the payment of the money loaned on the bonds. There is not a court in the country which would hesitate so to declare upon these facts. And when the State placed these banks in liquidation, and thus took the control of their affairs, it was bound to guard this trust strictly and faithfully. It had no right to receive depreciated bonds at par, in payment for well-secured debts which it held in trust for third persons. What would the law of Louisiana or the courts of Louisiana say to a tutor or guardian who should receive depreciated paper in payment of a debt due to his ward secured by mortgage ? Undoubtedly, they would say it was unfaithful administration, and would order him to make good the difference. And may the legislature itself justly do what its own laws condemn as unfaithful and unjust ? As a question of right, this matter admits of no doubt. As a question of the constitutional power of the legislature, it is equally clear. This law impairs the obligation of a plain contract between the State and the banks on the one part, and the bondholders on the other ; and it is therefore in conflict not only with the Constitution of the United States, but with the fundamental law of Louisiana, which prohibits the legislature from enacting any law impairing the obligation of a contract. There are other grave objections to this law, which our limits do not permit us to state.

In regard to the States of Indiana and Illinois, we have very little to say. Indiana has a debt of more than

\$13,000,000, with a population of about 700,000 souls. The amount of taxable property in the State was returned in 1840 as about \$92,000,000. Illinois has a debt of upwards of \$13,000,000. The population of the State was less than 500,000 in 1840. To both these States the remark of Governor Carlin, of Illinois, in one of his messages, is applicable: "Unfortunately, at an unguarded moment, the State was allured from the path of wisdom and economy by the seductive spirit of speculation, and the wild fury of popular delusion which spread over every part of the Union, and induced to embark in an expensive system of internal improvements at a period when the country was literally deluged with an inflated circulating medium, which gave the semblance of success to the most visionary and chimerical enterprises." But both these States have immense natural resources, and a rapidly increasing population fully capable of developing them, and they must become wealthy. At present, we believe it is not in their power to comply with their engagements.

We have thus taken a rapid view of the condition of the public debt of those States which have not complied with their obligations. We find three distinct cases: States which are so deeply involved in debt that it is out of their power at present to perform their engagements; States whose resources and means of payment are ample, and who have never questioned the binding force of their contracts; and States able to pay, but refusing upon the ground that they are not bound to pay. Each has its duties and its dangers. The duty of those first named is clear. Their excuse for not paying is their inability. This excuse of course relieves them from nothing which they can do.<sup>1</sup> It may be a sufficient reason for not at once paying in full: it is no rea-

<sup>1</sup> The rule and its limits are equally clear: "If the obstacle be real, time must be given, for no one is bound to an impossibility." Vattel, l. 4, § 51.—"Non ultra obligari quam in quantum facere potest; et, an possit, permitendum alterius principis, qua boni viri, arbitrio." Bynk. Q. J. P., l. 2, c. 10.

son why they should not pay something; and that something should be enough to include all they can possibly effect. To do less than this is to avail themselves, for their own benefit, of the misfortunes which have fallen alike upon themselves and their creditors: it is, in fact, to commit a fraud. How much they can do and in what ways it can best be done the people of those States are themselves the most competent to decide. It is to be earnestly hoped that, in making the decision, they will not forget that their own honor and the honor of the country is deeply involved in it. Their danger is that they may postpone their measures too long. The great accumulation of interest is adding much every year to their burden. Every year they are becoming more and more accustomed to look upon the load as too heavy to be carried, and therefore to believe that no attempt ought to be made to lift any part of it. Such a feeling should be thrown off at once, and a manly vigor, such as the Western people are known to possess, should now be exerted.

The duty of those States which have the ability to pay, and have never questioned the obligation of their promises, is also clear. Unforeseen difficulties and disasters have prevented them from keeping the promises on which so many have relied. They have now had time to survey their difficulties, to recover from the amazement which their great disasters caused, to examine their resources and select the proper means to draw from them the needed supplies. The state of the country has become greatly improved. During the last four years, the people, made wiser by adversity, have been industrious and economical. They have consumed little, and produced a great deal. They have been blessed with fruitful seasons. The bankrupt law has relieved those who were insolvent and set them at work. Caution and honesty pervade the trade of the country. The general aspect of affairs is becoming prosperous, with a promise of security and permanency. This is the time to act on this great and urgent subject. Delay is not only

dishonorable, but unwise. Every private man knows that a state of insolvency is the most expensive of all conditions; and this is quite as true of a commonwealth as of an individual. Its best arrangements when in such a condition can be only a succession of shifts to get round difficulties which it would be much wiser and on the whole easier to clear away at once.

But without regard to the expediency of this course it ought to be and it will be enough for the people of Pennsylvania and Maryland that justice requires them to pursue it. They have not fallen into repudiation. They know the difference between honor and dishonor; and they know also that the honor of their government is their own. They will not fail to ask themselves the question what difference there is between denying the obligation of a contract and admitting its obligation but neglecting to keep it, between an open repudiation of a debt and fraudulently withholding the money. They will answer this question as all right-minded men must answer it: by admitting that in both cases the same injustice is done to the creditor; that in both cases the injustice is wilfully done by the debtor; and that it is of very little consequence by what name it is called or under the shadow of what pretence refuge is taken.

There remains only one other case of which to speak, and no true-hearted American can speak of it without pain. We refer of course to those States whose legislatures have by public acts repudiated portions of their debts. Before noticing these acts at all in detail, we wish to say what is not always remembered, either here or in foreign countries, that no legislature has repudiated a contract without at the same time declaring it to have been made under such circumstances as not to be a valid obligation either in point of law or natural equity. It has been seen how far we are from admitting that this plea amounts to a full defence. But we think it is of some importance to show what is undoubtedly true, that no public body in this country has denied the

obligation of the State to pay an admitted debt. Reasons affecting the equity of the claims and grounds which would be tenable if they existed have always been relied on as the cause of repudiation. We are not aware that it has been maintained anywhere that the people of a State can cancel an obligation by their mere will. How is it possible that the American people should ever listen to a doctrine so absurd? How can they forget that the binding force of a contract depends upon a law which neither kings nor people enacted or can repeal? It comes from the awful Being who created and fashioned us, who sustains our life and judges our actions. It was enacted by His will; it is enforced by His power; and the united will of the whole human race cannot influence it. That which is unjust will remain so, though all mankind should call it just, and try to believe it.

He who enacted this law will surely enforce it. He doth govern the nations upon earth; and they who disregard their solemn obligations and break their plighted faith, and repay confidence with deceit, and a trusting dependence on their honor with open injustice, must come to know and feel bitterly that the high qualities they have set at naught are essential to their own prosperity; that without them nothing is secure; that embarrassment and loss, undeveloped resources which produce only discontent, and energies unexercised which create nothing but restlessness, are the inevitable destiny of a people guilty of bad faith. We believe the American people know this; and, because they know it, they who would lead them to do wrong have sought for fair pretences to make it seem right. The great mass of the people of the United States never have listened to these pretences, and we firmly believe never will listen to them. It is not strange, however, that some should have hearkened to them and been led astray. But the time is fast approaching, and is now close at hand, when every State which has the ability to pay its debts or any part of them must begin to pay, or begin to be openly and know-

ingly fraudulent. Two ways are before them, the one leading to justice and honor, the other to repudiation and disgrace: one or the other must be deliberately chosen, and that soon.

It may assist us to discern the character of one of these paths, if we will attend for a moment to the true meaning of the word *repudiation*. In substance it means confiscation. There is no just distinction between an act of the legislature requiring me to surrender a part of my property to the public use without compensation, and an act declaring that the State shall not and will not pay an equal amount which is due to me. No doubt the former would alarm a greater number of persons than the latter; but this only renders it less dangerous, if such things admit of degrees of danger. Analyze the laws, and see if there be any difference between them, and where the difference lies. By the act first supposed, the State puts in motion its agents, and its civil or military force, and transfers to itself the possession and use of that which is mine. But in so doing it does no wrong. This is an act of eminent domain such as every government performs occasionally; and it would cease to be strong enough for any useful purpose, if it did not possess this power. But as soon as my property has been thus taken the State owes me compensation for what I have surrendered. If it makes this compensation, all is right; and my property has been lawfully appropriated to the use of the State. If it refuses to make it, then my property has been confiscated, and the State has been guilty of a gross act of arbitrary power.

Such are the principles involved in the law first supposed; and, if we consider the other, we shall find the same principles applicable there. The State borrows my money, promising to pay it to me or to any one to whom I shall assign the obligation. It now owes to me a recompense for what it has received. This duty grows out of the receipt of my money by the State, as in the other case it

grew out of the receipt of my property. In the one case, the obligation to make compensation arises out of the mere justice of the claim, or, to use legal language, it is implied from the circumstances of the parties; in the other case, the obligation arises from the express promise of the State. In both there is a perfect obligation, and the wrong done is the same; namely, the violation of a perfect obligation to make compensation for money or property used by the State. It may be added that the wilful refusal to repay a loan to the State, made on the faith of a positive promise, contains an element of wrong which does not ordinarily belong to mere seizures and confiscations; for it is treacherous as well as unjust.

There is another respect in which the two cases approach still nearer to each other. The written obligation of the State by which it has promised to pay to me, or to any one to whom I shall assign such obligation, a sum of money, is both in form and in substance property. It is so known to the law, and it is so in fact. It may be the subject of a larceny or a trespass, of a sale or a bequest: it is a thing of value of which I have the rightful possession. And it is wholly immaterial to me and to the question of right whether the State takes it out of my possession by force or renders it valueless by refusing to pay it. The only difference between the two would be that in the one case I should lose the paper and ink of the obligation; in the other case I should not,—a distinction which will hardly be deemed important. It is clear, therefore, that repudiation and confiscation are in principle the same; and, if we can feel a preference for one over the other, we should say without hesitation, Let us have confiscation; let us have seizures made and contributions levied openly and with as much fairness as acts of such arbitrary power admit, rather than obtain possession of money under the confidence reposed in solemn promises, and then add treachery to injustice by repudiating them. The violent course is the more manly one.

Certainly, it would be desirable that perfect justice to all men should be at once the only foundation and the object of human governments. This never has been, and perhaps never will be. But mankind have continued to live, and have enjoyed many, and perhaps most, of the blessings which grow out of the social state under governments in whose constitutions it is easy to detect bad elements. But if there is one principle of policy which can be considered as settled, and as essential to all tolerable government, it is that which demands the absolute security of property. Men will submit to a great deal so long as a just regard is shown for the rights of property: when these are attacked, they will submit no longer, unless they are content to be slaves. This is a truth made familiar and practical to the people of this country by the war of the Revolution which grew out of it, and by the written Constitution of the Union, and of every State in the confederacy which embodies and repeats it, and draws around it all the safeguards which human wisdom and foresight can supply. That private property shall not be applied to public uses without a just compensation; that no man shall be deprived of his inheritance except by the judgment of his peers and the standing laws of the land; and that no State shall pass any law impairing the obligation of any contract,—are principles as familiar to us as our own names. The anxious care which our fathers took of the right of property has not been in vain. The principle was planted in a friendly soil, and has struck deep root. That branch of the great Anglo-Saxon family by which this continent is peopled has a strong and honest attachment to property and its rights. It is not a blind and sordid love of wealth, debasing the mind and hardening the heart. As a people, we are not avaricious. We spend freely, and we give with the largest generosity. It is because we know the uses of property that we value and love it. We want it for ourselves, that we may have a freer and larger scope for wise enjoyment and improvement.

We want it for our children, that they may be secured, as far as we can secure them, from the evils of ignorance and dependence. We want it for the charities which are waging perpetual war upon vice, and alleviating the miseries of the human condition; and for our churches and colleges and schools, which fit us to live in this world, and teach us humbly to hope for a better life hereafter. We want it for our country, in whose grand march of improvement we feel so much pleasure and pride. We have connected with it—and we think it a natural connection—all our ideas of justice, of social order, of personal security, and of the peaceful pursuit of happiness.

How great, then, must be the violence done to the sense of right of such a people before they can bring themselves to injure these clear and well-understood rights of property! They must first be corrupted and degraded. In this country, all power emanates from them, and at frequently recurring periods returns to them to be delegated anew. And though it may sometimes happen that they are not responsible for particular measures at the time they are taken, it cannot happen that any unjust thing of sufficient importance to attract their attention should be done by their delegated government, and remain without a remedy except by their will. This subject of repudiation is too large to escape notice, and too important to be passed over without a distinct and strong exertion of the popular will. If the doctrine it involves is ever carried into effect, it must be because a majority of the people have adopted it. Can that evil day come without first corrupting the people? What will, then, have become of that loyalty which attaches us to our country with the bonds of strong affection; of that love of national glory, and that quick sense of national disgrace without which no people ever were, or deserved to be, great; of that regard for justice upon which alone rest our laws and all our social order and internal peace; of that attachment to property out of which spring our habits of

industry, our untiring energies, our progress in the arts and comforts and securities and charities of life? What will have become of all these when a majority of this people come to look upon a particular body of men, embracing citizens as well as foreigners, as their lawful prey, to be pursued across the barriers of the Constitution, and over every safeguard which national honor and good faith can raise up, and to be seized and destroyed in the sight of the civilized world?

Let us not think, if we do this wrong, that we are no worse than others, for we are bound by more and stronger obligations than ever rested on any other people. The reverence of the Pilgrims for duty and conscience; the lofty love of justice of Penn and his associates; the pure equity and constant regard for the rights of all of Lord Baltimore and his colony; the high honor and chivalric spirit of Smith and Oglethorpe, and the Southern colonists,—all call out to us not to bring disgrace upon the children of such fathers. The providence of God, which has led us through a feeble infancy and supported our steps in times of great trial, and raised up mighty men to supply our needs and stand as examples in time to come, which has made us millions from a handful, and poured upon us a tide of prosperity such as never blessed any other people, persuades us not to repay this kindness by breaking His law of justice. The hopes of mankind that the great experiment of self-government may succeed, and its influences go forth all over the earth, till all men are raised to freedom and established in its secure enjoyment, beseech us not to violate that principle of justice which is the corner-stone of every free government. They warn us that we are extinguishing the light which had begun to enlighten the world; that we are putting into the mouths of kings and nobles the bitter words of contempt against all republics; that we are enabling them to say, not without an appearance of truth, that, because we have no hereditary nobility, we have no nobleness of soul;

that, because we have abolished the rights of primogeniture, we can no longer inherit the manly virtues of our fathers ; that in a republic nothing is fixed ; that it is not too much for such a government to attempt by its will to displace God's eternal laws for the sake of a base pecuniary advantage ; and that, if a people so descended, so taught by experience, so educated by schools and churches, so prosperous and proud, will descend so low, how little can justly be expected of any other people who should attempt self-government ! Such is the language to which the friends of free government abroad are forced to listen, and to the truth of which they begin to assent.

But it is not merely the regard which we owe to our fathers, our gratitude to God, and our duty to the principles of a free government, which urge upon us the rightful course. There is, besides, an enlightened and religious public opinion, which shines upon the world like the sun and penetrates everywhere like the common air. No people can escape from its influence or resist its power. It has already become the voice of the great family of civilized man. None can refuse to hear it. It comes from the heart of our common humanity, and so must reach the heart of all whom it addresses. As yet it does not speak on many subjects ; but who can doubt that a deliberate and wilful violation of the plighted faith of great republics, by which distress and ruin are brought into numberless homes, is a subject on which it *will* speak ? Who can doubt that it will find in such cases those elements in which all mankind have a common interest ? Have men ceased to entertain a profound regard for good faith ? Has fidelity to engagements ceased to be a virtue of importance ? Has common honesty become useless to mankind ? " Justice is the great standing policy of all civilized States." All the world now knows it, and no nation can depart from this policy without dishonor and degradation.

Let us, then, look upon this matter as it really is, and as all men must at last view it ; nay, as it stands now before

that great tribunal where no popular pretexts can avail. There it is of no advantage to say that many of these debts are held by rich and selfish foreign capitalists who care for nothing so much as to wring money from the hard earnings of our people. A wise man told us long ago that he did not listen with much credulity to any who spoke evil of those whom they were going to plunder; and the world thinks little of the epithets we bestow on those who ask us only for justice. It demands of us, In what code of morals or laws do we find it written that the circumstances or condition of a man furnish the least excuse for doing him a wilful wrong? It asks us if this is the spirit of our republican doctrine, that all men are *equal* in the sight of the law. It asks how we can know the conditions and circumstances of our creditors; whether we have the means of investigating them; whether we have attempted to use those means; how many widows and orphans, whose sole hope of earthly comfort rested upon our honor, we find recorded on our list; how many aged men, past the season of active labor, have invested the savings of long lives in our good faith, and what we have done to relieve them. These are questions which the public opinion of Christendom already asks, and which must be answered; and, unless we speedily act upon this subject as justice and honesty require, the misery of our case will be that we can make no answer which will not involve us in deep disgrace. We may, it is true, attempt to plead that as to some of these debts there are technical defences; and that, in respect to others, the agents who were charged with their negotiation committed gross frauds on the States. Be it so. But the States selected their own agents, and trusted them; and therefore every just principle requires that the States should bear the consequences of these frauds. And as to the technical objections, if any such exist, no civilized government is worthy of its name which would take advantage of them. A government straining after a technical objection to avoid payment of a just

debt to a creditor who probably scarcely looked at the instrument when he parted with his money, except to see plainly expressed upon it that "the faith and credit of the State was pledged" for its payment! Such a government, we repeat it, is not worthy of the name. It is a great pettifogger, and not a government. The more powerful it is, the greater is its disgrace. The more proud it is, the greater is its meanness. The more enlightened it is, the greater is its sin.

We have said that, in substance, repudiation is confiscation. And what would future times say to a series of acts of confiscation by which the great republics of the New World, in the middle of the nineteenth century, should appropriate millions of property to their own use? The inquiry would be made, Was it enemy's property, seized in time of war; or was it taken in the midst of a revolution as a signal and severe punishment for great crimes against the State? If so, though opposed to the lenient and more humane spirit of the present age, and in itself of very doubtful propriety, the laws of nations do not positively forbid it, and the examples of nations in less favored times might afford some excuse for it. But what must be the reply? It must be that these acts were done in a time of profound peace; that they fell alike upon citizens and upon strangers, upon the child who was too young to be otherwise than innocent, and women and aged men who were too feeble to be feared; that they were directed against no crime; that they were justified by no principle; that they were naked acts of arbitrary power, prompted by no motive except a base love of money. We cannot bring ourselves to fear that the American people, or any considerable part of them, will ever stand fairly before the world in judgment for this great crime. We know that their dangers and difficulties are not small; but we believe they will be met and overcome by the vigor and courage which have hitherto conquered all difficulties and met all dangers undismayed. It

is, however, the part of wisdom to look steadily at these dangers and difficulties; and it may aid us to do so, if we consider the effects already produced by repudiation.

The first and most obvious effect of even the small favor with which this doctrine has been received is that it has seriously impaired the pecuniary credit and resources of the country. The conduct of a few States has not only destroyed their own credit, and left their sister States very little to boast of, but has so materially affected the credit of the whole Union that it was found impossible to negotiate in Europe any part of the loan authorized by Congress in 1842. It was offered on terms most advantageous to the creditor, — terms which in former times would have been eagerly accepted ; and, after going a begging through all the exchanges of Europe, the agent gave up the attempt to obtain the money in despair. It is impossible to believe that any capitalist refused to lend his money because he doubted the ability of the United States to pay their debts. Nor is it credible that the mere failure of a few of the State governments to meet their engagements would have produced this extraordinary effect. It is the truth, and it should sink into the heart of every American, that this loan was refused because Europe doubted the honor of this country. We say it should sink into the hearts of our countrymen ; but it should stir no anger there. *We* know that the honor of this Union is, and we firmly believe it ever will be, untarnished. *We* know the distinction between the States and the national government, and the hardship of most of the cases in which States have failed to perform their promises ; and we know, too, how little progress the odious and infamous doctrine of repudiation has made. But the word *repudiation* has been sounded in the ears of men in Europe till they have begun to fear it is the settled doctrine of a majority of our people. Every failure to meet an engagement by a State is looked upon as a practical result of this theory. And it is, therefore, not at all wonderful that the

pecuniary credit of the country should first be brought into doubt and then speedily destroyed. We have no right to be angry; but we cannot help feeling a deep concern both for the cause and the effect.

For, aside from all considerations which affect our national honor, the pecuniary credit of a State is a matter of great public concern. All governments are liable to unforeseen and pressing wants, which can only be met and supplied through the public credit, because these wants occur under such circumstances as render immediate and adequate supplies highly important or absolutely necessary, and when taxation cannot furnish them speedily enough to meet the pressing occasion. Our form of government does not exempt us from such wants. The two great political parties which have ruled this country since the adoption of the Constitution agree that any accumulation of money raised by taxation is not to be thought of, and that no more is to be drawn from the people than is absolutely necessary for the time being, to enable the government to exercise economically its appropriate functions. But both parties have found, when in power, what, indeed, any party must always find,—that there are always great obstacles in the way of a large and sudden increase of taxes. No people will submit to it willingly. It requires time to convince them of its necessity and policy; some time is necessary to enable them to accommodate their affairs and resources to the new demand. But the emergency leaves no time. Invasion or insurrection will not wait till public opinion has become reconciled to an increase of taxation, and till the public agents have gone through the slow process of obtaining a supply from that source.

We have learned also from the experience of the last three years that even in time of peace, and when there are no extraordinary demands upon the energies of the country, it may not be possible to carry on the government without the aid of loans. Within that short period, we have seen

the national government become so embarrassed that it could not have performed its most necessary functions, if relief had not been obtained by borrowing money. And we have had some opportunity to see what great pecuniary sacrifices must be made by the public when money must be had while a shade rests on the credit of the borrower, and how important, in point of economy as well as honor, is an unstained reputation for fidelity to engagements. It concerns, therefore, the safety of every government that the prompt and adequate resources of the public credit should not be trifled with and lost.

The views which we have thus far presented respect our domestic condition and policy ; but the subject has a direct connection with the foreign relations of the United States. It has always been admitted to be one of the duties, and consequently one of the rights, of the sovereign power in every nation to see that gross injustice be not done to its subjects or citizens in a foreign country. If the injustice be of such a nature as to admit of legal remedy, and the courts of the land where it is done are open for redress, the sovereign is bound to wait till that redress has been sought for and refused in the highest court known to the law of that country. It is presumed that justice will be done according to the course of the law of the land ; and this presumption can be removed only by an actual failure to obtain it in the highest court. No nation can answer for the equity of proceedings in all its inferior courts. It suffices to provide a supreme judicature by which error and partiality may be corrected. This presumption holds even when redress has been refused, unless the decision is palpably wrong,—*in re minime dubia*. But where the decision against the foreign claimant is evidently unjust, or when the law studiously withholds its aid, so that he cannot obtain the fruits of a decision in his favor, or when the courts of the country are not open to his suit, the foreign sovereign is bound to listen to the complaints of his subject thus

injured, and either make indemnification or seek it from the people by whom the wrong has been done. It is apparent, therefore, that at no distant day this matter may become the occasion of negotiation with those governments whose subjects are interested in these debts. In such an event, the preliminary question would be whether any courts of this country are open to foreigners seeking to recover their money of the States. As a general rule, the courts of the States cannot entertain a suit against the States. There are only three exceptions known to us, and those are the State of Mississippi, which allows the holders of her bonds to bring suits against the State in her own Court of Chancery, and the States of Maryland and Virginia, which in some instances have allowed suits against themselves, but always, we believe, by special laws. How far the case of Mississippi would come within the rule of international law which binds the claimant to seek for redress in the courts of the land where the wrong was done, we are not prepared to say. So far as we know, it would be a new case. The Chancellor of Mississippi is elected by the people every six years. He is, therefore, appointed by and directly dependent on one of the parties to the suit, and the case has been prejudged by the legislature. Now, if the rule should apply at all, and the parties should be held bound to seek for justice at the hands of a judge thus situated, it seems clear that the decision would be much more open to doubt than in ordinary cases where the foreigner sues a citizen. If the presumption that justice will be done according to the law of the land should exist, it would certainly be weak and easily removed, and would be quite as likely to lead to disputes and contentions as to settle them.<sup>1</sup>

<sup>1</sup> The conduct of the courts of the States in reference to British debts was a fruitful source of controversy between England and this country in 1792, and it is notorious that great amounts of those debts were not and could not be recovered until after the establishment of the courts of the United States. See the correspondence between Mr. Jefferson and Mr. Hammond, the minister of Great Britain. Waite's Am. State Papers, 1789 to 1796; *Ware v. Hylton*, 3 Dal. 199; Elliot's Debates, 142-144, 282.

It is manifestly of great importance to us to have the full benefit of the presumption which, for the sake of peace, the law of nations raises in such cases. Without this presumption, the claim for redress must be made on the government of the United States, and the cases judged of and decided by the parties to the negotiation; after which, if the foreign government is not satisfied with the result, it has just cause for reprisals, and even for war. With it, the matter is first submitted to the highest legal tribunal; and the foreign government is bound to be satisfied with its decision, unless so palpably wrong as to give rise to the belief that it was corruptly made. We have said that the claim for redress must be made upon the United States; for we cannot entertain the least doubt that the national government is as much responsible for injustice done to foreigners by the States as by individuals or corporations. Foreign States can know only that sovereign which has the power to make war and peace, to negotiate and enter into treaties. They can no more have relations with a State than with a county. If the wrong is done within the territory of the United States, the United States must answer for it.

But we believe our Constitution has not left us without the protection which is enjoyed by all other nations who have courts of justice open to foreigners seeking redress, and where they are bound to presume that justice will be done. The Constitution, as originally adopted, contained, in Art. III. Sect. 2, the following words: "The judicial power shall extend to controversies between a State, or the citizens thereof, and foreign States, citizens, or subjects." The eleventh article of the amendments declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Thus the original provision as to suits against one of the United

States by foreign States was allowed to stand. Mr. Chief Justice Marshall, in his very able opinion in the case of *Chisholm v. The State of Georgia*, has stated the reason of this provision in such a manner as renders it quite applicable to our present purpose. He says the Constitution contained this provision: "because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people ought to be ascertained by and depend on national authority." There can be no doubt, therefore, that by the very terms of the Constitution a foreign State or sovereign may sue one of the United States in some court of the United States. Nor has the Constitution left it doubtful, or even left it for Congress to provide, which court it shall be; for it contains the following words: "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

We conceive also that a foreign State or sovereign may easily be placed in such a condition as to prosecute these claims. It is incident to the sovereign power that it should be able to make itself the owner of such claims. The rules as to the purchase and sale of rights of action which affect individuals are not applicable to the sovereign. The law presumes that the government of a country will not be guilty of champerty or maintenance. Under the common law, the king might take an assignment of a debt, and sue therefor in his own name. And we have no doubt that the same law exists in all countries. It seems to follow, then, that if the sovereign should take an assignment of a claim, and sue therefor in the court of a foreign country, the comity and respect due to the foreign sovereign would necessarily prevent the court from inquiring into the causes and motives of the assignment; especially in a country where the common law exists, which makes all debts negotiable between the sovereign and a subject or citizen. And if this motive were

inquired into, it would appear that the foreign sovereign had taken the assignment merely to discharge a duty to his subjects by affording to them a remedy for a supposed wrong.<sup>1</sup>

Certainly it would not be a subject of complaint or regret on our part that this course should be taken, and that the foreign sovereign should submit the question to the decision of our own highest tribunal, instead of resorting directly to negotiation. In the event of such a thing becoming necessary, we should look upon an application to the Supreme Court of the United States as not only practicable but desirable, and we should feel thankful for the existence of that principle in the public law, and that wise provision in our own Constitution, which enable us to ask foreigners to seek for justice in that high tribunal which was created to establish it,—a tribunal known to the world as elevated far above all State biases and prejudices, whose members come together from the North and the South, from the East and the West, across distances wider than half of Europe, and listen to sovereign States as they contest their claims to territory and jurisdiction; a tribunal which sits in judgment on the acts of the legislature of the nation, and decrees them to be valid or void; a tribunal which is our own ark of safety, and to which offended Europe may come confidently and obtain such justice as war and reprisals never gave and never can give.

We have now presented our views of this important subject. We fear that intelligent men throughout the country have hitherto scarcely done their duty in regard to it. They have looked upon it as interesting only those States which

<sup>1</sup> It has sometimes been suggested, in answer to the view taken by us, that the Judiciary Act has so limited the jurisdiction of the courts of the United States that an indorsee or assignee of a chose in action cannot sue in those courts, unless the assignor or indorser could himself sue therein; but that limitation has reference only to suits in the Circuit and District Courts. It does not touch the original jurisdiction of the Supreme Court, which is conferred by the Constitution, and is not within the control of Congress.

are embarrassed by debts, and those which have taken false steps to escape from them. They have thought it a matter of national concern only because it affects our character as a people. But they must no longer forget that the rights of every honest man are violated by an unjust act of the government under which he lives. It has been thought to be one of the advantages of a free government that the individual is not merged in the State; that each citizen is regarded and cared for, not merely because important to the State, but for the sake of his own welfare and happiness. For him, as a man, laws are enacted; for him rights exist; for him remedies are provided. He stands before all tribunals capable of claiming whatever is just. He means not to identify himself with any class or community or corporation. As a citizen, he has all the rights which can be had; and, among those rights, he has eminently that of requiring the government of which he is a constituent part to do nothing which shall stain his honor, or shock his sense of justice, or lessen his patriotism, or deprive him of his share of the glory of his country; and if any public act does this, he has as much right to feel aggrieved as if his personal liberty were infringed. It is true he walks abroad unharmed in his person, but a violent constraint has been put upon his love of justice. It is true, his house and land are untouched; but his country's glory, for which he would at any time have sacrificed them, has been squandered and lost. He still has a country, but that which made it lovely in his eyes has been defaced and destroyed.

Let every honest man, then, take care to do what in him lies to protect himself from this great wrong, and never rest until the faith of his country has been redeemed, and its honor secured from reproach.

## REPORT OF THE COMMISSIONERS

APPOINTED

TO REVISE AND REFORM THE PROCEEDINGS IN THE COURTS OF JUSTICE IN THIS COMMONWEALTH.

JANUARY, 1851.

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### COMMONWEALTH OF MASSACHUSETTS.

THE Commissioners, appointed in pursuance of the Resolves of the Legislature, "to revise and reform the proceedings in the courts of justice in this Commonwealth, except in criminal cases, and report the same to the Legislature, subject to its adoption or modification," do now, in execution of their commission, so far as they have been able to complete the same, respectfully submit the following

#### REPORT.

They beg leave to state that, as early as possible after this commission was filled, they took measures to avail themselves of the practical experience of the courts and bar of the Commonwealth, by addressing every judge and lawyer known to them, and inviting their attention to the subject of this Resolve. From members of the courts as well as of the bar, replies were obtained, containing very important suggestions, and strongly tending to confirm the commissioners in the belief that defects now exist in the proceedings for the administration of justice, which admit of remedy.

It may at first view seem unaccountable that in a State which from early times has enjoyed the advantages of a learned and upright judiciary, an accomplished and vigilant bar, and a legislature easily appealed to, and always found

mindful of the importance of reform in the proceedings for the administration of justice, we should find ourselves, at this day, working under what can hardly be called a system of procedure, and which every well-informed lawyer condemns, under whatever name it may go. To understand this, and at the same time to perceive the point where, as we think, a wrong course was taken, which has been further and further followed until it has led to the present state of things, it is necessary to look for a moment at the history of this branch of the law, the evils which have led to legislation, and the nature of the remedy which has been adopted.

The proceedings of the courts of this Commonwealth were always simple when compared with those of the English common-law courts, from which those proceedings were mainly derived. But we borrowed, among other things, special pleading. No one can have understood this system without a profound admiration of it as a work of human genius, nor without perceiving that it is capable of accomplishing perfectly those objects of first-rate importance where facts are to be tried by a jury, the separation of the law from the fact, and the production of simple and exact issues, to be submitted to their appropriate tribunals.

It certainly was not to be wondered at that special pleading, which had been considered an integral part of the common law, and which had so many excellencies to recommend it, should have been imported with that law and introduced into use here. But it was found that it had great defects as a practical system. In perfectly skilful and cautious hands, it worked admirably, but unfortunately perfect knowledge of so complicated and subtle a system, and extreme vigilance in the use of it, are things not to be reckoned on in practice; and accordingly this sharp and powerful machine inflicted many wounds on the ignorant and unwary. This was seen to be wrong; but instead of looking for the defects in the system, and amending them,

if capable of amendment, and, if not, changing it for another, a course of legislation was begun, which has ended in having no system at all.

Thus, as early as 1783 (Stat. 1783, c. 38, § 8), it was enacted that executors, administrators, and guardians should not be compelled to plead specially, but might give any defence in evidence under the general issue. As if it were a hardship, not to be inflicted on these classes of persons, but, which must still be endured by suitors generally. Similar favors, as it would seem they were considered, were from time to time granted to all persons sued before justices of the peace, except in cases where title in trespass was to be pleaded (than which few things are more difficult to do rightly), to persons sued on penal statutes, to civil officers and persons acting by their commands, insurance companies, and dog-killers. And, finally, by Statute 1836, c. 273, all special pleas in bar were abolished, the general issue, general demurrers, pleas in abatement (to which a general demurrer operates as special), motions in arrest of judgment, writs of error and declarations according to the old system being still retained. So that he who now surveys what remains sees every plaintiff left to inhabit the old building, while all others are turned out of doors. We seem to be walking for a short distance in the ancient but strongly built streets of an old town, and all at once to step out into the open fields, having here and there a piece of sunken fence and a half-filled up ditch, and some ruins of broken walls, which afford excellent lurking-places for concealment and surprise, but no open highway for the honest traveller.

The evils of this state of things may not readily occur to the mind, but they are very great. They are felt in preparation for, during, and after the trial. Neither party has any legal means of knowing what questions of fact or law are to be tried. Each must therefore conjecture, as well as he can, all reasonable possibilities, and prepare for them.

This not only occasions much needless labor of the party and his counsel, but the expense of witnesses to prove facts which on the trial are found to be immaterial, or are admitted. This last consequence by no means exhausts itself in the needless fees of witnesses. In this industrious community, it is to most persons an inconvenience and cause of loss to attend the courts as witnesses: this inconvenience and loss are, not seldom, very considerable; and the onerous duty should be imposed on as few persons as possible.

Both parties coming to the trial with no certain knowledge of the points of the case, or the course which the trial is to take, each must feel his way as he goes: the court and jury must do the same, and it often happens that it is not till the concluding arguments of the counsel are made that the jury can get any clear idea of what is to be tried by them; the case on neither side having been opened, because neither side knew what the case was. The immediate effects are very dilatory conduct of the trial, and the consumption of much time in beating over ground, which is found, at last, to lie quite outside of the case. The remote effects are to induce a loose habit of preparation for the trial, to compel the court to rule on questions without any general view of the case, and to find out the matters to be tried often near the close of the trial; to cause a *nisi prius* trial to be a kind of preliminary inquiry to get the case into shape, instead of a trial of it; to render verdicts less important; and, as a consequence of the operation of all these causes, to make it almost a general rule that cases of considerable importance go before the whole court upon exceptions or motions for new trials. The commissioners have carefully endeavored not to overstate the effects of the present condition of our law of procedure, and they know that the opinions of many experienced persons, both judges and lawyers, concur with their own on this subject.

Looking back over the course which has been pursued, and seeing the end at which we have arrived, the commis-

sioners submit that the principles of legislation on this subject have been erroneous. They do so with the highest respect for former legislatures, and with diffidence as to their own conclusions. But they feel it to be their duty to state those conclusions frankly, and to submit for the consideration of the legislature the reasons on which they are founded.

The course of legislation clearly shows that former legislatures, feeling the evils resulting from special demurrers, motions in arrest of judgment, and the other machinery by which the rules of special pleading have been enforced, and seeing the hardships and frequent failures of justice to suitors which they have occasioned, instead of keeping in view the great objects of pleading and the substantial means of attaining those objects, and endeavoring to diminish the number of technical rules and to restrict the limits within which objections should be allowed to be taken, have swept away from time to time the essential with the useless, the substantial with the formal, without regard to any differences between them; and have done this by a series of acts which have rested on no principle, but have been occasional, fragmentary, and partial. Even the last sweeping act, while it prohibits defendants from pleading specially, relieves the plaintiff from no technical rule which could be taken advantage of by general demurrer, or motion in arrest of judgment, or writ of error.

The question for us is, What should be done? The answer to this question must depend upon the choice which is made of one of several general modes of procedure. One is to have all the proceedings, after the parties are summoned, conducted orally. Under this, the parties come before the tribunal with their witnesses, and talk out their case. Neither party has any legal means of knowing beforehand what the other will say or prove. There are no limits for the debate, nor certainty nor definiteness concerning the subject of dispute, nor record of what has been

done. It is obvious that this would not answer our wants. In a rude state of society, whose manners are simple and whose affairs are easy of comprehension, it is probably the best of all modes. No man can suppose it fitted for this rich, populous, and refined Commonwealth. The oral plan, probably all will agree, must be rejected, and we must have written allegations. These are demanded for four purposes: 1st. That each party may be under the most effectual influences which the nature of the case admits of, so far as he admits or denies any thing, to tell the truth. 2d. That each party may have notice of what is to be tried, so that he may come prepared with the necessary proof, and may save the expense and trouble of what is not necessary. 3d. That the court may know what the subject-matter of the dispute is, and what is asserted or denied concerning it, so that it may restrict the debate within just limits, and discern what rules of law are applicable. 4th. That it may ever after appear what subject-matter was then adjudicated, so that no farther or other dispute should be permitted to arise concerning it.

These being the ends to be attained, it is manifest that system is best, theoretically, which most perfectly attains those ends. But practically they may all be perfectly attained, and yet at such an expense of time and money, and the failure of justice from technical rules, as to render the system the worst possible. What we have to seek, therefore, is the system which will best attain these important ends at the least expense of time and money, and with the fewest technical rules, which, though necessary to some extent, should not be permitted to work substantial injustice; and, above all, should not be allowed to operate when their object has been accomplished, or in the progress of the suit has ceased to be possible.

So far as known to us, the experience of mankind has developed but two general plans of proceeding by written allegations. One is to have the allegations settled and the

issues framed by a public officer. The other is to have each party, with the aid of his counsel, make such allegations as he thinks proper. The first was the Roman mode. The parties went before the Praetor, who, having heard them, settled the allegations which each was allowed to make. This has been imitated in some modern codes; but we have no hesitation in saying it is impracticable in this Commonwealth. Not to dwell upon the habits of our people, which would render them very reluctant to have their own affairs taken out of their hands in this way, we are satisfied that the hearing necessary to settle the issues would be nearly equivalent in expense and trouble to a trial, and that it would require a large number of officers, possessed of skill, learning, and character, little, if at all, inferior to the judges of the courts. This mode, therefore, we cannot advise.

The other general mode is the one which has always been pursued under the common law, and it receives our decided preference. The question is, under what particular rules it shall be worked out.

We are of opinion that it is not expedient to restore special pleading, even as modified by the new rules in England. We do not deem it necessary to examine in detail the objections to this system, but will state shortly those which have satisfied our own minds.

1st. The divisions of actions seem to us to be too numerous; and the necessity of preserving each division, and of applying to it its own peculiar rules, gives rise under that system to many technical questions.

2d. The rules concerning special pleas, though logically correct, and necessary perhaps to the perfection of that particular system, are so numerous, so refined, and not seldom so difficult of application, as to require the highest skill and care in their use. If they exist, they must be administered; and the opinion of the profession in England at this moment seems to be that they produce a great deal of injustice and still more inconvenience. Yet pleadings are there

drawn by men whose sole occupation is to learn and apply these rules, and who undoubtedly possess a degree of skill and habits of caution in its use, which ought not to be expected, and certainly would not be found, amidst the wider range of occupation and attainment at our bar.

3d. It has long been considered essential to this system to allow objections to mere form. If a party concludes his plea by saying that he is ready to verify what he has averred, when he should have said that he puts himself on the country or *e contra*, and the defect is taken advantage of, his plea is bad. A system which can only be worked by a strict observance of many minute and subtle forms will scarcely work well in practice anywhere, certainly not here. It has been rather a favorite saying with common lawyers that form is often substance. By this is meant more than that the safest way to secure substance is to observe an approved form: it is meant that form is so necessary that it is practically substance. And this is true to a great extent in special pleading. But surely it is a grave objection to the system. To attain the ends of pleading with the use of the fewest possible merely technical rules is the desideratum. And we do not think the system of special pleading has arrived at it.

4th. In our judgment, it is a serious defect in this system that it requires the record, when examined upon a writ of error or a motion in arrest of judgment, to be free in all its parts from what are deemed substantial defects. In stating the objects of pleading, we have considered that they are four in number: by reference to them, it will be seen that all but the last have respect only to the preparation for and conduct of the trial. Now if the trial has been had, if all parties and the court have treated the allegations as sufficient, it is extremely difficult to see why in our practice they should not be deemed so. A trial is not like a lesson or a work of discipline or instruction, to be gone over again because it was not perfectly done the first time. Counts in

contract and tort are not to be joined, because it may be inconvenient to try them together. But if they have been tried together, and the inconvenience suffered, or found in that particular case not to exist, it would seem to be a strange way to attempt to lessen the inconvenience by setting aside all that was done, and doing the work over again. Allegations are made that the parties may have notice. But if both parties were content to act upon what they had, why should either be allowed to complain afterwards? The verdict ought to conform to the allegations, so that it may be known that the jury have passed on the actual subject of dispute. But if the losing party makes no objection to it and suffers a judgment to be rendered in conformity with it, why should he be allowed afterwards to say that the real dispute has not been settled? How do we know it has not? He may answer, "Because the allegations show it." He should have said that earlier. Suppose he were to say, "I made a mistake in my allegations and they do not present the actual case, and so the jury have not passed on the real right of the matter." The ready answer would be, "You should have shown that before verdict." Why should he not show the other before judgment? In short, why should any rule of proceeding be enforced in a particular case after the practical object of that rule has either been attained or waived by the parties, so that its attainment is no longer possible? The rule for that case should be deemed to have answered its purpose, and be no more spoken of.

The system of special pleading known to the common law seems to us not to have worked well in practice. Of this there is the evidence afforded by the direct testimony of those best qualified to judge, and by the printed reports of the courts by which the system has been administered. No more disinterested and competent witness than Lord Coke can be found. Speaking in the reign of James I., he says: "When I consider the course of our books of years

and terms, from the beginning of the reign of Edward III., I observe that more jangling and questions grow upon the matter of pleading and exceptions to form than upon the matter itself; and infinite causes lost or delayed for want of good pleading." (Coke on Littleton, 303 a.)

An examination of the various statutes for the amendment of this branch of law, and the decisions of the courts since his day, will convince any one that these discordant sounds have not ceased. Notwithstanding the efforts at reform made by the judges in the reign of William IV., and the new rules promulgated by them, the dissatisfaction of the profession and the public has continued to increase, and recent publications by highly respectable barristers assert that it is now universal at the English bar. During the past year, a commission has been authorized by Parliament upon the promotion of the attorney-general, which is now considering this subject and which is expected to report what can usefully be done.

Having for these reasons concluded that the English system of special pleading is not to be adopted, the inquiry recurs, What is to be done? Shall we rest with what we have, or borrow a plan from a system of foreign law, or attempt to create a new one? We can advise neither. There seem to us to be decisive objections to each. To rest as we are is to continue to impose upon the people of the Commonwealth a burden of delay, vexation, and expense, which in our judgment necessarily grows out of the present state of things.

To borrow a plan from a system of foreign law would be extremely hazardous and inconvenient. There is an intimate connection between a system of law and its modes of procedure, and we should fear to try the experiment of raising such a foreign plant in our soil. The habits, terms, modes of thinking, and all that enters into the practical working of proceedings for the administration of justice, and causes them to move kindly and easily, forbid such an attempt.

Still less should we be willing to create a new plan. We

have no such confidence in our own powers as would permit us to engage in such a work. Indeed, we have little respect for such a work, in whosever hands it may be. From the days when Mr. Locke created a constitution down to the production of the last code which came out of the closet of any professor, we believe one important lesson has been taught: that all law should be derived, not created; deduced by experience and careful observation from the existing usages, habits, and wants of men, and not spun out of the brains even of the most learned.

Our earnest endeavor therefore has been to take what we now have,—with which all practitioners and, to a certain extent, the people themselves are acquainted, and to which their habits are adapted,—and amend and build upon it, not in a foreign style of architecture or with wholly new materials, but, as far as possible, with old materials and after the old fashions, calling things by their old names whenever they can be applied. We have proposed to retain the ancient, fixed, and well-defined general division of personal actions, striking out the subdivisions which we deem unnecessary, and thus getting rid of a large body of technical rules respecting those subdivisions and the means of preserving them. Something had already been done by the legislature in this quarter. By Statute 1836, c. 273, § 3, it was enacted that, when the plaintiff shall mistake the form of action suited to his claim, the court shall permit amendments; and by Statute 1839, c. 151, § 4, it was enacted that in actions on the case it shall be no objection that the form ought to have been trespass. It would seem to be difficult to give a good reason why the converse should not hold true, and that of this statute it might be said that it is a poor rule which will not work both ways.

We have proposed to retain the declarations known to the common law, because practitioners and the courts are now familiar with them, and because we believe there is thereby afforded a body of precedents for stating the plaintiff's case,

which for clearness, precision, and brevity have never been equalled, and a system of rules for framing new forms, when the rare case occurs requiring one, which system, as amended in this act, is not difficult to be understood and applied. We have endeavored to provide forms adapted to some usual cases, that they might be enacted by the legislature, placed in the hands of all who have use for them, and afford guides for the framing of such others as may be needful in practice. The office of the declaration is to state the facts on which the plaintiff founds his claim, and to make known to the defendant and the court what that claim and those facts are. By an amendment proposed (sect. 2), nothing more than this shall be required. Hereafter no judgment shall be arrested, because the plaintiff does not say *contra formam statuti*, when it is the business of the court to know whether what is alleged to have been done was against the form of a statute; nor shall he be required to state any thing but the truth. Legal fictions may be harmless, for they deceive no one; but we do not find them necessary, and they would be a serious embarrassment in the plan we propose, which requires each party to verify by his oath or affirmation what he alleges.

This subject of the verification of allegations by the parties has been much considered.

According to the rules which we propose, the parties will have two strong reasons for telling what they believe to be the truth in their allegations, so far as those allegations go. The first is that each party puts the result of his case upon the facts which he states; and he will of course desire to state those which he believes he can prove, otherwise he must fail. The second is that he is required to declare, under the highest sanction known to the law, that he believes what he says. We cannot think it unreasonable to require this of the parties. If they do not believe what they say, they ought not to have an opportunity to try to make the court and jury believe it, or to call witnesses and

make their oaths a substitute for their own. It is our opinion that this requisition will be attended with important practical benefits; that it will check unfounded claims, and still oftener unjust defences to good claims, which are now entered upon not seldom, we fear, with a knowledge on the part of the defendant that the plaintiff ought to prevail, but a hope that, if put to prove his claim, he may on some point fail. If every defendant be required to state distinctly in writing what his defence is, and to verify it by his oath, we think very few such defences would be attempted. It may be said, "Bad men will swear falsely." But no new advantage will be gained by them, if they do so; for their oath is not evidence: it only puts them in a condition to be heard upon their proofs, and they have that privilege now without any restriction.

It is the opinion of the commissioners that the system of written allegations proposed in the following statute will produce speedy judgments at a small expense on uncontested claims; that it will tend to check merely speculative suits; that it will generally prevent parties who know they have no defence from pretending to have one, in order to obtain delay, or to put the plaintiff to prove his case in the hope that he may fail; that it will separate the actions which are for trial from those which are not for trial; that it will apprise the parties and the court of what is to be tried; that it will afford means of separating the law from the fact; and that it will accomplish these objects by few technical rules, and with as little labor and expense as their nature admits of.

To this plan the commissioners propose to have added such provisions as will enable each party to resort to the knowledge of the other party, and obtain a discovery of facts and documents pertinent to the suit. This may now be done by a separate suit in equity called a bill of discovery. But it is expensive, dilatory, hampered by many technical rules, and from these and other causes is, in our practice, as nearly useless as any remedy can well be.

The commissioners for revising the statutes, in their report, made in December, 1834, revised the then existing law of the Commonwealth respecting forcible entry and detainer, and embodied it in the first nineteen sections of the one hundred and fourth chapter of their report. The residue of that chapter contained the laws of remedy as between landlord and tenant, to which the process of forcible entry and detainer was supposed to have some resemblance. When this report came under consideration of the legislature, those two subjects were amalgamated, and one process only was provided for both classes of cases. It has seemed to the undersigned, from their knowledge of the practical effect of this change, as well as from a review of the legal principles involved in it, that these two processes do not admit of being thus united without working important and injurious changes in the character of both, and that the manner of uniting them in the Revised Statutes has obliterated the distinctive features of the process of forcible entry, and greatly impaired its utility. The object of this process is not to settle title, but only the right of present possession ; and not even this, except in cases where the possession has been disturbed, or an entry is prevented, by force. It is really to quell force and violence, and to protect the public peace, by promptly depriving the wrong-doer of the fruit of his wrong. This is very different from a case where a tenant holds over after the end of his term, and requires a different remedy ; and the ancient and long existing law of the State provided one adapted to the case, but differing widely from the landlord and tenant's process. The former, as we have said, did not involve title. If the person entering or detaining by force was the lawful owner, and the complainant had, as against him, no mere right whatever to the property, such owner was to be turned out of the possession which he unlawfully gained by force. But the latter is always a question of title, and nothing else. The former was an inquisition, the latter is a trial with right of appeal.

This is far from being a formal distinction. Mingling these remedies renders impossible that summary and vigorous justice which is appropriate to a case where illegal violence has been used to disturb possession. We attribute no little importance also to the fact that the inquisition was to be made by twelve men of the neighborhood. It seems to us to be fit that in such a case a jury should be called ; that it would tend to check such wrongs, as well as to discover the truth in the particular case. A forcible entry is a high offence against the public peace, undoubtedly indictable as a misdemeanor, and should be treated with more solemnity than to be disposed of in a justice's office in the same way as a small debt. On examining the different sections of the 104th chapter of the Revised Statutes, we find it difficult to determine how far some of them apply to one or the other of these proceedings. The third section is as follows : "No restitution shall be made, under the provisions of this chapter, of any lands or tenements of which the party complained of, or his ancestors, or those under whom he holds the premises, have been in the quiet possession for three years next before the filing of the complaint, unless his estate therein is ended." This limitation, which without the last restrictive clause is perfectly applicable to forcible entry, with this last clause ought not to be so applied. For suppose the party's estate is ended, if he has held more than three years by force, it would be absurd to give a summary remedy against him. The process is not fit for such a case. On the other hand, as between landlord and tenant, this last clause makes the whole section useless. For of course the landlord cannot have restitution till the tenant's estate is ended. So that the exception embraces every case of this class which could by possibility come within the rule. The eighth section gives a right of appeal, and upon appeal the case is to be conducted like other appeals from justices in civil actions ; and, by section ninth, if the title shall appear to be in question, the case is to be transferred to the Court

of Common Pleas. How much of this is applicable to the one proceeding or the other, it is not easy to say. If it was meant that the title can and may be put in issue in a process for forcible entry, it is plain it ceases to be of any value when the party who entered with force had title, and the process becomes a clumsy writ of entry, which tries the title without settling it. We have concluded, therefore, to recommend the restoration of the law substantially as it existed from ancient times, and the necessary provisions for that purpose will be found in sections 83 to 102 inclusive.

According to the common law, no person who has previously been convicted of any infamous offence in this Commonwealth (Rev. Stat. c. 94, § 56), of which petty larceny may be considered the least; and no person who has any pecuniary interest in the result of the suit can be examined as a witness. Persons convicted of those offences out of the Commonwealth, or who have received a pardon from the executive, are competent. Any one having a pecuniary interest, who can divest himself of it or be released, may thus become competent. The statutes of this Commonwealth have from time to time made many inroads on these rules of exclusion. From the year 1785 down to the last session of the legislature, a series of acts have rendered competent members of certain public and private corporations, some informers suing for penalties, parties when a third person contested the title to property attached, or where usury or gaming was averred, fence-viewers in suits for fees, and executors, administrators, guardians, and trustees in certain cases. In England as early as 31 Geo. III. c. 127, persons convicted of petty larceny were made competent to testify; and by 9 Geo. IV. c. 32, the disability was removed from those convicted of misdemeanors; and, finally, in 1843 (6 & 7 Vict. c. 85) it was enacted that no person should be disqualified to give evidence by reason of interest in the subject of the suit, or by a previous convic-

tion of any offence; but this was not extended to parties, or to the husband or wife of any party.

This law in substance the commissioners recommend to be passed, and the 104th section of the act contains the necessary provisions to that effect. It affects two distinct classes of cases,—interested witnesses and criminal witnesses. Different considerations are applicable to each. And, first, as to interested witnesses. If the object of the law is to allow those only to testify who are free from interest, it certainly does not attain this end, not only because it does not attempt to exclude any who have an interest, however deep, in the parties to the suit or in the question to be tried, but because in almost all cases any person whom either party desires to call, and who is willing to be called, can easily qualify himself or be qualified, without changing his actual relation to the suit or its subject-matter. The very common case of a corporation illustrates this. A person owns stock in a corporation. The corporation wants his evidence in a suit to which it is a party. He is willing to testify, and he transfers his shares to a friend and takes a note in payment. There is no contract that he shall have the shares again and restore the note,—though it is an every-day occurrence for such witnesses frankly to say on the stand that they have no doubt they shall have the shares again; and it not seldom happens, when a second trial comes on, that the witness has had them back, and has gone through the form a second time, just previously to or during the second trial. So when a master is sued for the negligence of his servant, and in a great variety of other cases, a release puts an end to the legal difficulty, though the witness's real disposition and relation to the suit have not changed. Now this state of the law is open to very serious objections. It gives rise to many nice and difficult questions respecting interest, to be passed on by the judge in the course of a jury trial, which not only consume much time in discussion, but not seldom, being

ruled erroneously, render new trials necessary. It begets contempt of the law, to see it insisting positively on rules which a scratch of the pen evades, and tends to fix in the public mind an impression that the law countenances indirection and quibbling. It puts it in the power of witnesses to determine whether they shall be examined or not. For if a person will not qualify himself or be qualified, he cannot be examined, and thus he may if he please keep back so much of the truth as he knows, and increase the chances of injustice. When we consider, therefore, how incomplete the rule is at the best, how many embarrassments its administration produces, how easily it is evaded, and how much reproach it brings upon the administration of justice, we do not hesitate to recommend a change.

Respecting persons convicted of crimes, we have much more doubt. The theory of the law is that such persons have shown themselves not possessed of that moral character which is a necessary basis on which to repose confidence; that what they say may be true or false, but we have no such certainty that it is the former as to render their evidence fit material out of which to construct a verdict. But here, again, the rule is extremely partial and incomplete. There is no difference between a larceny and a conviction of it on one side of the State line and the other. Yet, if on our side, the man is excluded; if on the other side, he is admitted. It is true that all general rules must stop somewhere, and the State line in this case may be the proper place. As a rule of exclusion, it may be the best which the subject admits of. If we are to have a rule of exclusion, this may be the right one. But this does not prove that any rule of exclusion is practically expedient; and, in determining its practical expediency, the impossibility of framing one which is not partial and incomplete is seriously to be weighed. It may be said that this consideration is not of much importance, because persons convicted of crimes and offered as witnesses here in Massachusetts

will most probably have been convicted here, and so be excluded. But we doubt this fact. Criminals are not generally stationary. When out of the hands of justice, they are very apt to go where they are not known ; and, considering the great increase of immigration into this State from foreign countries, and the facilities for locomotion which are increasing so fast, and the laws punishing what are called "second comers," we can have little doubt that the number of persons now within our limits, who have been convicted of crimes out of Massachusetts, exceeds the number convicted in Massachusetts ; and this disproportion is not likely to diminish. The rule has not therefore the recommendation that it is directed against those cases most likely to occur, *quæ frequentius accident*. On the contrary, its practical effect is to operate on the smaller, and leave untouched the larger number.

We have been a good deal influenced by the course of legislation in England. It is well known that changes of this character in their common law are made with great caution, not to say reluctance, and that this was even more true formerly than at present. It is known also that such changes when made are watched by very vigilant and competent persons, and that, if their practical operation proves to be bad, no enlargement of them is to be expected. Now, as we have said before, this rule of the common law excluding persons convicted of infamous offences was broken in upon in the 31st of Geo. III. After some years' experience of its operation, it was still further restricted ; and in 1843, under the auspices of a judge of great practical experience as well as eminent judgment and sagacity, the whole rule was abolished. We would not speak with confidence of the identity of their wants and ours, for we know the difficulty of forming a comprehensive and perfectly safe opinion on such a subject. But there are so many points of resemblance that we think we cannot err in saying that their experience is worthy of great consideration. In both coun-

tries, substantially the same system of law is administered, by tribunals constituted in the same way, and eliciting truth by the same instrumentalities. The court tries the law, and the jury the facts. The rules of examination and cross-examination are similar. We should be sorry to believe, and see no reason to believe, that our juries are less intelligent, discriminating, sagacious, or judicious, in short, less fit to be trusted to weigh and sift doubtful testimony, than theirs. And therefore we have been influenced ourselves by their course of legislation, and have brought it to the notice of the legislature, that it may have its due weight.

It has been suggested that all rules of exclusion should be repealed, that parties to suits should be allowed and compelled to testify, and the husband and wife be witnesses for and against each other. In this opinion we do not concur, for reasons which apply to each case.

As regards husband and wife, we are satisfied of the propriety of the rule, which protects as confidential all that may be said or done by either when alone with the other, except so far as the personal safety of either party from violence requires its disclosure. The reasons for this must occur to every mind. We think it would materially affect this most important relation, if the parties could be compelled to appear as witnesses against each other. To allow a husband to call his wife as a witness in his own behalf seems to us also objectionable, not so much from the danger of perjury as from the effect of influences extremely adverse to the perception and recollection of the truth.

A great deal of discussion has been had concerning the examination of parties on the stand. The plan does not meet our approval, though we have no doubt that the means of probing the conscience of a party concerning facts within his knowledge ought to be greatly increased, and we have accordingly proposed such provisions as seem to us to be safe and expedient. But against the examination of parties

in open court on the stand there are many objections, and one which to our minds is alone decisive. Advocates, charged with the management and conduct of causes on trial, have been found necessary in all civilized countries. One principal reason is that there are great inequalities between different men in respect to memory, judgment, acuteness, rapidity of perception, power of expression, and whatsoever tends to make a strong impression on a tribunal and to produce a favorable result. This inequality is much diminished by employing persons trained to this occupation; for, though there are inequalities in these particulars amongst persons so trained, they are far less than would otherwise be found. Now, if parties are put on the stand in presence of the jury, to be examined and cross-examined by dexterous and skilful lawyers, this inequality comes in play with increased effect. Place a man with a strong, clear head, and quick apprehensions on one side, and one who never knew any thing certainly in his lifetime on the other, and what chance of justice would the last have in a case at all doubtful? It is a great mistake to suppose that all justice or all truth is on one side of every case or even of most cases. By far the larger number have elements of right and truth on both sides, and the grand difficulty consists in finding out which has the most. Now, let such a man as is first described stand up and testify his part of the truth, and you will be sure to get it all, and that in the way to make the most impression; and when the other comes to tell his part, he does not know it, or if he does he cannot tell it, and is about as likely to go wrong as right, with intentions as fair as those of the first one. Every experienced lawyer knows that this must be so from his intercourse with clients under circumstances far more favorable to the discovery of the truth, than if they were on the stand. So that we believe it would prove in practice to be any thing but promotive of that equality which justice loves, and which is essential to the attainment of it, to

allow parties to appear on the stand. We should also apprehend not a little danger of rash and inconsiderate swearing in the heat and excitement of a trial, when the stress of the case was felt, if dexterous examination and cross-examination should be applied to the litigants themselves. We do not think it for the interests of justice or the public morals that parties should be placed in such situations.

Nevertheless, it does not seldom happen that facts are known to parties alone, or that the means of proof are expensive and difficult to be had, or that the facts are not susceptible of denial, and no proof ought to be required; and in these cases it is clear there should be some means of compelling the parties to answer. This is now done by a bill of discovery filed on the equity side of the court; but this is a slow, expensive, and we think the experience of the profession will justify us in saying almost a useless, remedy. We propose to substitute for this a right to file interrogatories in writing touching any matter pertinent to the suit, which the party to whom they are addressed must answer on oath or affirmation. This has long been practised in courts of admiralty, and was introduced into the courts of Virginia some time since, and more recently into those of some other States. We believe it will be an extremely useful instrument, and will attain most of the benefits, without the evils, of examining parties as witnesses on the stand.

Explanations of many of the proposed changes will be found in the form of notes under the sections to which they respectively relate.

The commissioners have embraced in this report no provisions as to proceedings in equity. The reason is that they have arrived at an opinion: that proceedings in equity may reasonably be conformed to a very great extent to proceedings at law, that this is the best mode of reforming those proceedings, and that, until the latter have been settled and

enacted by the legislature, it is not wise to attempt to do any thing with the former. They have, however, prepared themselves to report on this part of their commission at an early day; and, as soon as they can know what system of legal proceedings is to be taken as their basis, they will have the honor to submit their second report.

It is scarcely necessary to say that the statute which follows has no pretension to the name or character of a code of practice. It is simply what its title imports, an act to change some of the proceedings, practice, and rules of evidence of the courts of the Commonwealth. It may be doubted whether the codification of the law of procedure would have been within the authority conferred on the commissioners. But they have not particularly considered this, for they are of opinion that it is not expedient to make such a code. All changes in the form as well as in the substance of laws are necessarily productive of some inconvenience, and tend to produce new doubts and questions. Changes can be justified only by the existence of practical evils which admit of clear and appropriate remedy. By these considerations, the commissioners have endeavored to govern themselves in making the proposals contained in the following draft of an act, which they respectfully submit to the legislature. They desire to bear their testimony in favor of the simplicity, efficiency, and general excellence of a large part of the modes of proceeding in the courts of justice in this Commonwealth. No better evidence of their own opinion can exist than that, under a commission so broad, they have recommended comparatively few changes. From these, if adopted by the legislature, they believe important benefits will be derived.

All which is respectfully submitted by

B. R. CURTIS,

N. J. LORD,

R. A. CHAPMAN,

*Commissioners.*

CHARGE TO THE JURY

IN THE CASE OF THE

UNITED STATES *versus* ROBERT MORRIS,

*Before CURTIS and SPRAGUE, JJ.*

NOVEMBER 11, 1851.

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JUDGE CURTIS in charging the jury said that a preliminary question as to the powers of the court and jury in criminal cases, which had been fully and ably argued in their hearing, had been considered by the court and an opinion pronounced; and that the court had decided that it was their duty to express their opinion of the law, and that the jury were to take the law as stated by the court, and apply it to the facts which they find. As to the facts, the court had no responsibility; and here the responsibility of the jury begins. The indictment was explained to consist of a large number of counts, which, however, for the sake of clearness and convenience, might be divided into two classes. First, the first fourteen counts to sustain which it was necessary for the government to prove that Shadrach was lawfully held to service by John Debree; that he escaped to Massachusetts; that John Caphart was Debree's agent, duly authorized to claim him; that on Caphart's complaint a warrant was issued by the commissioner; that Shadrach was arrested thereon and brought into this court-room; that time was granted by the commissioner; that an order was passed by the commissioner, directing to keep the prisoner, which order was delivered to Patrick Riley, the

Deputy Marshal; that Shadrach, while so held by the marshal under this order escaped, and that Morris aided the escape. Under the second class, embracing the remaining counts of the indictment, it was necessary for the government to prove that Mr. Riley held Shadrach under lawful process of the United States, and that Morris obstructed him in the execution of this process; and, as to all this, the burden of the proof is on the government.

The court said that it would be best for the jury to examine these charges separately, although all the facts were common to both. And, first, they should consider whether in point of law and fact they were made out. As to some of the facts, there was no controversy, but other important facts remained on which the jury must pass. First, was Shadrach held to service, by the laws of Virginia, by John Debree; and was he the identical person respecting whom the papers were given by Debree to Caphart? It had been argued to the jury that they were to believe these facts only on such evidence as would induce them to send one of their own children into slavery. But this was not so: there was here no such question, it is to be judged by the facts; and the question is, Do the jury believe the witnesses? As to Debree there is no question, and no attempt is made to impeach him. Then as to Caphart. The law has provided rules; and one is that a witness under oath is to be believed, unless in some way his testimony is impeached or invalidated. Is any thing adduced here going to impugn Caphart's character for truth and veracity? It has been argued that he has made such statements as to his relations with the colored population as should have that effect. A witness, a stranger among us, should be treated with fairness, and is not to be overwhelmed by our tempestuous sensibility. If, however, his statements as to his occupation and station in life seem to you to discredit him, then the first charge against the prisoner must fail, because Shadrach is not shown to have been held as alleged, or was

not the person described. All these counts rest on that allegation.

In the next place, there is very little controversy as to the question whether Mr. Riley was a person lawfully assisting the agent of Debree, as all these facts do appear by the papers of the case, and are made out by the law. The main question in the case then is, Did the defendant knowingly aid or assist in the escape? The question of conspiracy has been fully argued, but does not appear to the court to be very material. It is agreed that Shadrach was rescued by a body of men acting in concert, and it is quite immaterial at what time that concert was formed. Morris's acts and declarations might be divided into two parts, those made before the adjournment of the court and those subsequent to that time. The first depends on the declaration of Shadrach himself; and they were to consider whether any others than counsel had communicated with him, whether it was made in reference to an escape or attempt to do so, and whether it was in consequence of any declaration made by Mr. Morris. The government is bound to show not only that the circumstances are consistent with guilt, but that they are inconsistent with innocence. Morris, as counsel, had the same rights and privileges as other counsel, and his conduct must be presumed right until proved to be wrong.

It may perhaps be necessary to take other circumstances into consideration: they must be viewed as a whole. If all his conduct is sufficient to satisfy you that he was engaged in preparing a rescue, he is guilty of this part of the charge; but if, viewed altogether, it is consistent with his having no such plan, the charge is not proved. Even if it do not appear that he aided in the rescue, yet if he was present, and did nothing to prevent it, this would render him guilty under the statute; or in the testimony respecting his declaration in the entry, that there was a good "time" or "chance," it was their duty to take that impression which was most favorable to the prisoner, if there is any difference

between them. As to his alleged acts opposite Deacon Grant's house, there is a contradiction between the witnesses, and you will consider whether their testimony can be reconciled. As to the contradictory evidence respecting the question whether or not he was in the cab, they were to consider the probability of Harding's seeing Morris walking with Shadrach in Southac Street, others testifying that they did not see him there.<sup>1</sup>

The greatness of the crime and its consequences had been spoken of to the jury. And it was true that a great crime had been committed in the very place where justice is administered, which, if repeated, may lead to violence and bloodshed; but, though thus serious, they were not to convict an innocent man, but to consider the evidence with vigilance and fairness. The importance of the consequences to the prisoner should on the other hand guard them against light suspicions: they should act only on proper proof. They were to decide on their evidence as the good of society and the demands of justice required.

The jury received the case at half-past two o'clock, and at five were directed to return a sealed verdict, in case they should agree before the coming in of the court. At half-past nine o'clock this morning, they returned a verdict of not guilty.

<sup>1</sup> Under the second counts, it was necessary to prove that Shadrach was lawfully held by the marshal; and, if the jury believe that he was so held by the order of the commissioner, the same evidence that would have proved aiding in the rescue under the first counts will, under these, show that he resisted the officer. The Fugitive Slave Law the court held to be constitutional and valid, binding on the court and the jury as citizens, and in their official capacity.

## JUDICIAL OPINION

ON THE QUESTION, WHETHER JURIES ARE RIGHTFULLY  
JUDGES OF THE LAW, IN CRIMINAL CASES, IN THE  
COURTS OF THE UNITED STATES.

*Pronounced in the Case of THE UNITED STATES v. ROBERT MORRIS, in the  
Circuit Court of the United States, for the Massachusetts District, October  
Term, 1851.*

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The circumstances of the case in which this question arose are stated *ante*, vol. i. chap. vii.

THE Constitution of the United States, art. 3, § 2, provides that "the trial of all crimes, except in cases of impeachment, shall be by jury." The counsel for the defendant maintains that, in every such trial of a crime, the jury are the judges of the law as well as of the fact; that they have not only the power, but the right, to decide the law; that, though the court may give its opinion to the jury respecting any matter of law involved in the issue, yet the jury may and should allow to that opinion only just such weight as they may think it deserves; that, if it does not agree with their own convictions, they are bound to disregard it, the responsibility of deciding rightly all questions both of law and fact involved in the general issue resting upon them, under the sanction of their oaths.

This is an important question, and it has been pressed upon the attention of the court with great earnestness and much power of language by one of the defendant's counsel. I have no right to avoid a decision of it. I certainly should have preferred to have a question of so much importance — respecting which so deep an interest is felt, such strong

convictions entertained, and, I may add, respecting which there has not been an entire uniformity of opinion — go to the highest tribunal for a decision ; but it is not practicable in this case. I proceed, therefore, to state the opinion which I hold concerning it. The true question is, What is meant by that clause of the Constitution, “the trial of crimes shall be by jury”?

Assuming what no one will controvert, that the tribunals for the trial of crimes were intended to be constituted as all common-law tribunals in which trial by jury was practised were constituted, having one or more judges who were to preside at the trials and form one part of the tribunal, and a jury of twelve men who were to form the other part, and that one or the other must authoritatively and finally determine the law, was it the meaning of the Constitution that to the jury, and not to the judges, this power should be intrusted ? There is no sounder rule of interpretation than that which requires us to look at the whole of an instrument before we determine a question of construction of any particular part ; and this rule is of the utmost importance, when applied to an instrument the object of which was to create a government for a great country, working harmoniously and efficiently through its several executive, legislative, and judicial departments. It is needful, therefore, before determining this question upon a critical examination of the particular phrase in question, to examine some other provisions of the Constitution, which are parts of the same great whole to which the clause in question belongs. We find in article 6: “This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.” Nothing can be clearer than the intention to have the Constitution, laws, and treaties of the United States in equal force throughout every part of the territory of the United States, alike in all places, at all

times. To secure this necessary end, a judicial department was created, whose officers were to be appointed by the President, paid from the national treasury, responsible, through the House of Representatives, to the Senate of the United States, and so organized, by means of the Supreme Court established by the Constitution, and such inferior courts as Congress might establish, as to secure a uniform and consistent interpretation of the laws, and an unvarying enforcement of them according to their just meaning and effect. That whatever was done by the government of the United States should be by standing laws, operating equally in all parts of the country, binding on all citizens alike, and binding to the same extent and with precisely the same effect on all, was undoubtedly intended by the Constitution; and any construction of a particular clause of the Constitution which would tend to defeat this essential end is, to say the least, open to very serious objection.

It seems to me that what is contended for by the defendant's counsel would have something more than a mere tendency of this kind. "The Federalist," in discussing the judicial power, remarks: "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."<sup>1</sup> But what is here insisted on is that every jury, impanelled in every court of the United States, is the rightful and final judge of the existence, construction, and effect of every law which may be material in the trial of any criminal case; and not only this, but that every such jury may, and, if it does its duty, must, decide finally, and without any possibility of a revision, upon the constitutional power of Congress to enact every statute of the United States which on such a trial may be brought in question. So that we should have, not thirteen, but a vast number of courts, having final jurisdiction over the same causes, arising under the same laws;

<sup>1</sup> *Federalist*, No. 80.

and these courts chosen by lot among us, and selected by the marshal elsewhere, out of the body of the people, with no reference to their qualifications to decide questions of law; not allowed to give any reasons for their decisions, as will be presently shown, not sworn to decide the law, nor even to support the Constitution of the United States; and yet possessing complete authority to determine that an act passed by the legislative department, with all the forms of legislation, is inoperative and invalid. The practical consequences of such a state of things are too serious to be lightly encountered; and, in my opinion, the Constitution did not design to create or recognize any such power by the clause in question.

Some light as to its meaning may be derived from other provisions in the same instrument. The sixth article, after declaring that the Constitution, laws, and treaties of the United States shall be the supreme law of the land, proceeds, "and the *judges* in every State shall be bound thereby."

But was it not intended that the Constitution, laws, and treaties of the United States should be the supreme law in *criminal* as well as in *civil* cases? If a State law should make it penal for an officer of the United States to do what an act of Congress commands him to do, was not the latter to be supreme over the former? And if so, and in such cases, juries finally and rightfully determine the law, and the Constitution so means when it speaks of a trial by jury, why was this command laid on the judges alone, who are thus mere advisers of the jury, and may be bound to give sound advice, but have no real power in the matter?

It was evidently the intention of the Constitution that all persons engaged in making, expounding, and executing the laws, not only under the authority of the United States, but of the several States, should be bound by oath or affirmation to support the Constitution of the United States. But no such oath or affirmation is required of jurors, to

whom it is alleged the Constitution confides the power of expounding that instrument; and not only construing, but holding invalid, any law which may come in question on a criminal trial.

This may all be true; but strong reasons should be shown before it can be admitted.

I have considered with much care the reasons assigned and the authorities cited by the defendant's counsel, and have examined others which he did not cite; and the result is that his position, both upon authority and reason, is not tenable. I will first state what is my own view of the rightful powers and duties of the jury and the court in criminal cases, and then see how far they are in conformity with the authorities, and consistent with what is admitted by all to be settled law.

In my opinion, then, it is the duty of the court to decide every question of law which arises in a criminal trial: if the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence, and the like, the jury receive no direction concerning it; it affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial. If the question of law enters into the issue, and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are told truly: that law they are to apply to the facts as they find them, and thus, passing both on the law and the fact, they from both frame their general verdict of guilty or not guilty. Such is my view of the respective duties of the different parts of this tribunal in the trial of criminal cases; and I have not found a single decision of any court in England, prior to the formation of the Constitution, which conflicts with it. It was suggested at the bar that Chief Justice Vaughan's opinion, in Bushnell's Case, 5 State Trials, 99, was in support of the right of juries to deter-

mine the law in a criminal case: but it will be found that he confines himself to a narrow, though, for the case, a conclusive line of argument,—that, the general issue embracing fact as well as law, it can never be proved that the jury believed the testimony on which the fact depended, and in reference to which the direction was given, and so they cannot be shown to be guilty of any legal misdemeanor in returning a verdict, though apparently against the direction of the court in matter of law.

Considering the intense interest excited, the talent and learning employed, and consequently the careful researches made in England, near the close of the last century, when the law of libel was under discussion in the courts and in Parliament, it cannot be doubted that, if any decision having the least weight could have been produced in support of the general proposition that juries are judges of the law in criminal cases, it would then have been brought forward. I am not aware that any such was produced. And the decision of the King's Bench in *Rex v. The Dean of St. Asaph*, 3 T. R. 428, and the answers of the twelve judges to the questions propounded by the House of Lords, assume, as a necessary postulate, what Lord Mansfield so clearly declares in terms,—that, by the law of England, juries cannot rightfully decide a question of law. Passing over what was asserted by ardent partisans and eloquent counsel, it will be found that the great contest concerning what is known in history as Mr. Fox's Libel Bill was carried on upon quite a different ground by its leading friends,—a ground which, while it admits that the jury are not to decide the law, denies that the libellous intent is matter of law, and asserts that it is so mixed with the fact that, under the general issue, it is for the jury to find it as a fact.<sup>1</sup> Such I understand to be the effect of that famous declaratory law. (Stat. 32 Geo. III. c. 60.) The defend-

<sup>1</sup> Annual Register, vol. xxxiv. p. 170; 29 Par. His. Debates in the Lords, and particularly Lord Camden's Speeches.

ant's counsel argued that this law had declared that, on trials for libel, the jury should be allowed to pass on law and fact, as in other criminal cases. But this is erroneous. Language somewhat like this occurs in the statute, but in quite a different connection, and, as I think, with just the opposite meaning:—

“The court or judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury, on the matter in issue between the king and the defendant, in like manner as in other criminal cases.”

This seems to me to carry the clearest implication that, in this and all other criminal cases, the jury may be directed by the judge; and that, while the object of the statute was to declare that there was other matter of fact besides publication and the innuendoes to be decided by the jury, it was not intended to interfere with the proper province of the judge to decide all matters of law. That this is the received opinion in England, and that the general rule, declared in *Rex v. Dean of St. Asaph*, that juries cannot rightfully decide the law in criminal cases, is still the law in England, may be seen by reference to the opinions of Parke, B., in *Parmiter v. Copeland*, 6 M. & W. 165; and of Best, C. J., in *Levi v. Milne*, 4 Bing. 195.

I conclude, then, that when the Constitution of the United States was founded, it was a settled rule of the common law that, in criminal as well as civil cases, the court decided the law, and the jury the facts; and it cannot be doubted that this must have an important effect in determining what is meant by the Constitution when it adopts a trial by jury.

It is argued, however, that, in passing the Sedition Law, Stat. 1798, c. 74, § 3, Congress expressly provided that the jury should have the right to determine the law and the fact, under the direction of the court, as in other cases,

and that this shows that in other cases juries may decide the law, contrary to the direction of the court.

I draw from this the opposite inference: for where was the necessity of this provision, if, by force of the Constitution, juries, as such, have both the power and the right to determine all questions in criminal cases? and why are they to be directed by the court? In *Montgomery v. The State*, 11 Ohio, 427, the Supreme Court of Ohio, in discussing the question whether juries are judges of the law, refer to an article in the Bill of Rights of that State, which is in the same words as this section of the Sedition Act, and the opinion of the court then proceeds: "It would seem from this that the framers of our Bill of Rights did not imagine that juries were rightfully judges of law and fact in criminal cases, independently of the direction of courts. Their right to judge of the law is a right to be exercised only under the direction of the court; and if they go aside from that direction, and determine the law incorrectly, they depart from their duty and commit a public wrong, and this in criminal as well as civil cases."

There is, however, another act of Congress which bears directly on this question. The act of the 29th of April, 1802, in section 6, after enacting that, in case of a division of opinion between the judges of the Circuit Court on any question, such question may be certified to the Supreme Court, proceeds, "and shall by the said court be finally decided. And the decision of the Supreme Court, and their order in the premises, shall be remitted to the Circuit Court, and be there entered of record, and have effect according to the nature of such judgment and order." The residue of this section proves that criminal as well as civil cases are embraced in it; and under it many questions arising in criminal cases have been certified to and decided by the Supreme Court, and persons have been executed by reason of such decisions.

Now, can it be that, after a question arising in a criminal

trial has been certified to the Supreme Court, and there, in the language of this act, finally decided, and their order remitted here and entered of record, that, when the trial comes on, the jury may rightfully revise and reverse this final decision? Suppose, in the course of this trial, the judges had divided in opinion upon the question of the constitutionality of the Act of 1850, and that, after a final decision thereon by the Supreme Court and the receipt of its mandate here, the trial should come on before a jury, does the Constitution of the United States, which established that Supreme Court, intend that a jury may, as matter of right, revise and reverse that decision? And, if not, what becomes of this supposed right? Are the decisions of the Supreme Court binding on juries, and not the decisions of inferior courts? This will hardly be pretended; and, if it were, how is it to be determined whether the Supreme Court has or has not, in some former case, in effect settled a particular question of law? In my judgment, this act of Congress is in accordance with the Constitution, and designed to effect one of its important and even necessary objects,—a uniform exposition and interpretation of the law of the United States,—by providing means for a final decision of any question of law,—final as respects every tribunal, and every part of any tribunal in the country; and, if so, it is not only wholly inconsistent with the alleged power of juries, to the extent of all questions so decided, but it tends strongly to prove that no such right as is claimed does or can exist.

An examination of the judicial decisions of courts of the United States since the organization of the government will show, as I think, that the weight of authority is against the position taken by the defendant's counsel.

The earliest case is 3 Dall. 4. Chief Justice Jay is there reported to have said to a jury that on questions of fact it is the province of the jury, on questions of law it is the province of the court, to decide. And, in the very next

sentence, he informs them they have the right to take upon themselves to determine the law as well as the fact. And he concludes with the statement that both law and fact are lawfully within their power of decision.

I cannot help feeling much doubt respecting the accuracy of this report; not only because the different parts of the charge are in conflict with each other, but because I can scarcely believe that the Chief Justice held the opinion that in civil cases, and this was a civil case, the jury had the right to decide the law. Indeed, the whole case is an anomaly. It purports to be a trial by jury, in the Supreme Court of the United States, of certain issues out of chancery. And the Chief Justice begins by telling the jury that the facts are all agreed, and the only question is a matter of law, and upon that the whole court were agreed. If it be correctly reported, I can only say it is not in accordance with the views of any other court, so far as I know, in this country or in England, and is certainly not in accordance with the course of the Supreme Court for many years.

In *United States v. Wilson et al.*, Baldw. 78, which was an indictment for robbing the mail, the court instructed the jury explicitly that they had a right to judge of the law, and decide contrary to the opinion of the court; but in *The United States v. Shine*, Baldw. 510, which was an indictment for passing a counterfeit note of the Bank of the United States, the defendant's counsel having insisted to the jury that the bank was unconstitutional, the court with equal explicitness told the jury they had no right to judge of the constitutionality of an act of Congress, and in the strongest terms declared that the exercise of such a power would leave us without a constitution or laws. With great respect for the very able and learned judge, I cannot but think that the criticism of Judge Conkling (Conk. Pr. 426) is just, when he confesses his inability to discover any difference in principle between these two cases, with respect

to the rights of juries to decide the law in criminal cases; and, if so, the later opinion of that court was entirely adverse to the right claimed.

It has been suggested that the articles of impeachment of Judge Chase, and the line of defence adopted by his counsel, have a tendency to support the views of the defendant's counsel. The first article of impeachment does speak of the undoubted right of juries to judge of the law in criminal cases; but I can allow no other force to this than that it proves that a majority of the then House of Representatives thought it fit to make that allegation in that proceeding. And, although the counsel for the accused rested the defence of their client against this charge mainly on a denial of the facts, yet in the arguments of Mr. Martin and Mr. Harper will be found a statement of their opinions on this question, marked with that ability for which both were so highly distinguished, and leaving no ground for the assertion that the right in question was conceded by them.<sup>1</sup>

In *United States v. Battiste*, 2 Sumner, 240, Mr. Justice Story pronounced an opinion on this question during the trial of a capital indictment. He denied that this right existed, and gave reasons for the denial of exceeding weight and force. If we look to the decisions of the courts of the States, I think we shall find their weight in the same scale.

The earliest case is *People v. Croswell*, 3 Johns. Cas. 337. The question was as to the right of the jury to pass on and decide the intent, under an indictment for a libel. The court were equally divided. As has already been suggested, this is by no means the question raised here. And that by the law of the State of New York, at this day, the jury are not judges of the law, in the sense now contended for, I infer from the opinion of Judge Barculo in *People v. Price*, 1 Barb. (S. C.) 566; for, in the trial of

<sup>1</sup> Chase's Trial, p. 182.

an indictment for murder, he told the jury that it was their duty to receive the law from the court, and conform their decision to its instructions ; and under this ruling the prisoner was convicted and executed.

This question has been very carefully considered, and elaborate and extremely able opinions upon it delivered by the highest courts in Indiana, New Hampshire, and Massachusetts.<sup>1</sup> The reasoning of these opinions, so far as it is applicable to the question before me, has my entire assent. The question is not necessarily the same in the courts of the several States and of the United States, though many of the elements which enter into it are alike in all courts of common law, not bound by some statute or constitutional provision.

It remains for me to notice briefly some of the arguments which are relied on by the defendant's counsel, in support of his position. It is said that, in rendering a general verdict of guilty or not guilty, the jury have the power to pass, and do in fact pass, on every thing which enters into the crime. This is true. But it is just as true of a general verdict in trover or trespass ; and yet I suppose the right of the jury to decide the law in those cases is not claimed. The jury have the power to go contrary to the law as decided by the court ; but that the power is not the right is plain, when we consider that they have also the like power to go contrary to the evidence, which they are sworn not to do.

It is supposed that the old common-law form of the oath of jurors in criminal cases indicates that they are not bound to take the law from the court. It does not so strike my mind. They are sworn to decide according to the evidence. This must mean that they are to decide the facts according to the evidence. But, if they may also

<sup>1</sup> *Townsend v. The State*, 2 Blackf. (Ind.) 152; *Pierce v. The State*, 13 N. H. 536; *Commonwealth v. Porter*, 10 Met. 263.

decide the law, they are wholly unsworn as to that, and act under no obligation of an oath at all in making such decision. A passage in Littleton's *Tenures* (lib. 3, § 368), and the Statute Westminster, 2d C. 30 (13 Edw. I.), and the Commentary of Coke thereon, relating to an assize (2 Inst. 425), have been referred to, as throwing light on this inquiry; but it seems to me enough to say that the assize was not a jury; that an assize was not a criminal case, but an action between party and party; and that, if the statute intended to confer on the assize the right as well as the power to decide the law, it was a strange provision which subjected them to punishment if they decided the law wrong; for it would seem that what was right or what was wrong must be determined by the tribunal having the rightful power to determine it, which is supposed to be the assize itself.<sup>1</sup>

That it has been a familiar saying among the profession in this country, and an opinion entertained by highly respectable judges, that the jury are judges of the law as well as of the facts, I have no doubt. In some sense, I believe it to be true; for they are the sole judges of the application of the law to the particular case. In this sense, theirs is the duty to pass on the law,—a most important and often difficult duty, which, when discharged, makes the difference between a general and a special verdict, which, although they may return, they are not bound to return. They are a co-ordinate branch of the tribunal, having their appropriate powers and rights and duties, with the proper discharge and exercise of which no court can without usurpation interfere: but it is not their province to decide any question of law in criminal, any more than civil, cases; and, if they should intentionally fail to apply to the case the law given to them by the court, it

<sup>1</sup> For some able criticism on this statute, see the opinion of Gilchrist, J., in 13 N. H. 542; Worthington on *Juries*, 72-94.

would be, in my opinion, as much a violation of duty as if they were knowingly to return a verdict contrary to the evidence.

A strong appeal has been made to the court by one of the defendant's counsel, upon the ground that the exercise of this power by juries is important to the preservation of the rights and liberties of the citizen. If I thought so, I should pause long before I denied its existence. But a good deal of reflection has convinced me that the argument drawn from this quarter is really the other way. As long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But, on the other hand, I do consider that this power and corresponding duty of the court, authoritatively to declare the law, is one of the highest safeguards of the citizen. The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons or times, or the opinions of men. To enforce popular laws is easy. But when an unpopular cause is a just cause, when a law unpopular in some locality is to be enforced there, then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne.

I have entered thus at large into this important question, in the course of a jury trial, with unaffected reluctance. Having been directly and strongly appealed to, and finding that no judge of any court of the United States had in any published opinion examined it upon such grounds that I could feel I had a right to repose on his decision without more, I knew not how to avoid the duty which was thus thrown upon me. My firm conviction is that

190 PROFESSIONAL AND MISCELLANEOUS WRITINGS.

under the Constitution of the United States juries in criminal trials have not the right to decide any question of law; and that, if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given to them by the court.

## JUDICIAL OPINION

ON THE CONSTITUTIONAL VALIDITY OF AN ACT OF THE  
GENERAL ASSEMBLY OF RHODE ISLAND "FOR THE SUP-  
PRESSION OF DRINKING-HOUSES AND TIPPLING-SHOPS."

*Delivered in the Case of GREENE *v.* BRIGGS, in the Circuit Court of the United States for the Rhode Island District, November Term, 1852.*

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The occasion on which this opinion was delivered is described *ante*, vol. i. chap. vii.

THIS is an action of replevin for a quantity of wine and spirits, alleged to have been unlawfully taken and detained by the defendants, who justify the taking and detention by virtue of certain proceedings set forth in their avowry. These proceedings depend, for their validity, upon an act of the General Assembly of the State of Rhode Island, passed at its May session in the year 1852, and entitled "an Act for the suppression of drinking-houses and tippling-shops."

The plaintiff, having demurred to the avowry, insists that some of the provisions of this act, necessary to maintain the validity of these proceedings, are in conflict with the Constitution of the State, and therefore void; and so the taking and detention complained of are not justified.

The plaintiff is a citizen of the State of New York. Under the Constitution and laws of the United States, he is entitled to come into this court, and find here a remedy for any legal wrong done to him by citizens of Rhode Island. An adjudication upon his rights may, and in this case does, involve important questions arising under the Constitution

and laws of the State; but in such a case it is our duty to determine them, — a duty which we should neither seek nor avoid, but perform.

The Constitution of Rhode Island (art. 1, § 15) declares: —

“The right to the trial by jury shall remain inviolate.”

The tenth section of the same article is as follows: —

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining them in his favor; to have the assistance of counsel in his defence, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.”

Taking these two sections together, it may be said of them in general that, while the fifteenth section recognizes the existence of the right of trial by jury, and makes effectual provision for its preservation as it existed when the Constitution was formed, the tenth section declares, not only that this right is to exist in all criminal cases, but is to be accompanied by certain incidents and modes of proceeding, which are therein prescribed and defined. In other terms, in civil causes a trial by jury is to be had in those classes of cases in which it had been practised down to the time when the Constitution was formed; and such trial is to be substantially in accordance with such modes of proceeding as had then existed, or might thereafter be devised by the legislature, without impairing the right itself. But, in all criminal cases, the right to a trial by jury, accompanied by the other privileges enumerated and defined, is absolutely to exist.

In order to decide whether those parts of this act necessary to sustain the avowry are in conflict with these fundamental laws, we must have a clear view of what the act

contains; and as it provides for modes of proceeding quite anomalous, and some of its clauses need construction, I shall begin by stating what these parts of the act, in my judgment, authorize and require; and I shall then consider whether the proceedings, thus authorized and required, are in harmony with the constitution of the State.

Under this act, three voters, in the town or city where the complaint is made, may make a complaint in writing, under oath, to some justice of the peace, setting forth that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited and intended for sale in that town or city, by some person not authorized to sell the same under the provisions of the act. It is not required that any particular person should be named in the complaint as the person intending to sell such liquors contrary to law; nor was any person in fact named in the complaint which was the foundation of the proceedings in question. Upon the filing of such a complaint, the justice of the peace is to issue a warrant of search, directed to the sheriff, his deputy, the town sergeants, or constables in the county, one of whom is to proceed to search the premises described in the warrant; and, if any spirituous or intoxicating liquors are there found, he is to seize, secure, and keep them, until final action shall be had thereon. The officer is further required to summon the owner or keeper of the liquors seized, if known to him; but there is no other provision for giving notice to the owner or possessor, prior to an adjudication of forfeiture. There is a provision that, in case the owner is unknown to the officer, the liquors shall not be destroyed until they shall have been advertised for two weeks, to enable the agent of any town, duly authorized to sell such liquors, to appear and claim them; and, upon making due proof of title, the liquors are to be delivered to him, and not destroyed. But this has no application to any other owner; and the law expressly requires the justice to adjudge a forfeiture, if the owner fail to appear.

Upon the return of the warrant, if the owner or keeper do appear, and the justice is of opinion that the liquors have been kept or deposited for sale contrary to the provisions of the act, he is to adjudge a forfeiture, cause them to be destroyed, and inflict a fine of twenty dollars; or, if this fine be not paid, imprisonment for thirty days upon such owner or keeper. An exception is made in favor of imported liquors contained in their original packages; but the burden of proof is put upon the party appearing, to make out this defence. If the person claiming the liquors shall appeal to the Court of Common Pleas, he is required to enter into a recognizance, in a sum not less than two hundred dollars, with good and sufficient sureties, conditioned, among other things, that he will pay all fines and costs that may be awarded against him; and if the final decision shall be against the appellant, that such liquors were intended by him for sale, contrary to the provisions of the act, and the quantity seized exceed five gallons, he is to be adjudged "a common seller of intoxicating liquors," and punished as such by a fine of one hundred dollars, or, in default of its payment, by imprisonment for sixty days; and he is also subjected to increased penalties on a second conviction.

On reviewing these proceedings, it will be seen that, in order to obtain a trial by jury, the party must give security in a sum not less than two hundred dollars, with two sufficient sureties, to pay all fines and costs which may be adjudged against him; and must subject himself to the hazard of having the fine inflicted by the justice of the peace, increased fivefold, if the quantity of liquor seized should exceed, as in this case it did exceed, five gallons.

To require security for the payment of the penalty and costs, as a condition for having a trial, so far as I am informed, is a novelty in criminal jurisprudence; and, in my opinion, it is not only essentially unjust, but in conflict with that clause of the Constitution which secures the accused from being deprived of his life, liberty, or property,

unless by the judgment of his peers, or the law of the land. Natural right requires that no man should be punished for an offence until he has had a trial, and been proved to be guilty; and a law which should provide for the infliction of punishment, upon a mere accusation without any trial, if the accused should fail to furnish two sureties to pay the penalty which might after the trial be adjudged against him, would be viewed by all just minds as tyrannical; for it would treat the innocent, who are unable to furnish the required security, as if they were guilty and would punish them, while still presumed innocent, for their poverty or want of friends.

And it is equally clear that such a law would not be "the law of the land," within the settled meaning of that important clause in the Constitution. Certainly this does not mean any act which the Assembly may choose to pass. If it did, the legislative will could inflict a forfeiture of life, liberty, or property, without a trial. The exposition of these words as they stand in Magna Charta, as well as in the American Constitutions, has been that they require "due process of law;" and in this is necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it, unless it is proved. Lord Coke, giving the interpretation of these words in Magna Charta (2 Inst. 50, 51), says they mean due process of law, in which is included presentment or indictment, and being brought in to answer thereto. And the jurists of our country have not relaxed this interpretation. *Hoke v. Henderson*, 4 Dev. 15; *Taylor v. Porter*, 4 Hill, 146, 147; 3 Story, Com. on the Const. 661; 2 Kent, 13, n.

It follows that a law which should preclude the accused from answering to and contesting the charge, unless he should first give security in the sum of two hundred dollars, with two sufficient sureties, to pay all fines and costs, and which should condemn him to fine and forfeiture unheard,

if he failed to comply with this requisition, would deprive him of his liberty or property, not by the law of the land, but by an arbitrary and unconstitutional exertion of the legislative power.

And if this would be the character of a law which made the right to any trial dependent on such a condition, can it be maintained that to prescribe such a condition does not impair the right to a trial by jury? In such a case, the appeal has annulled the sentence of the justice of the peace. The accused is presumed to be innocent. He has had no such trial as he has a right to have. He now claims this particular kind of trial, as the prescribed constitutional means of determining whether he is to be punished. A condition which would impair his right to any trial, if prescribed as the condition of his having any, impairs his right to this trial if prescribed as a condition for his having it.

The fourteenth section of the first article of this Constitution declares:—

“Every man being presumed innocent until he is pronounced guilty by the law, no act of severity, which is not necessary to secure an accused person, shall be permitted.”

Undoubtedly, this clause has reference chiefly to acts of severity against the person of the accused. But it not only contains the great principle of the presumption of innocence until the accusation is proved, but points out the security of the person that he may be tried, as the only just or admissible reason for exercising any control over one still presumed to be innocent. And in my judgment any law which disregards these principles, and introduces a new object,—namely, the security of the payment of the fine and costs,—and denies a trial by jury, unless the security is given, does not allow the right to such a trial to remain unimpaired. If this were not so, there would be no limit to legislative control over this right; for if one onerous condition may be imposed, so may any number, until the right

becomes so difficult of attainment that it ceases to be a common right, and can be enjoyed only by a few.

I find it equally difficult to reconcile the increase of penalties upon a conviction after an appeal with the unimpaired enjoyment of the right of trial by jury. The act inflicts a fine of twenty dollars, if a conviction takes place before a justice of the peace. It must be that the legislature considered this the appropriate penalty for the offence. Certainly it cannot be said that the offence is aggravated by the accused having claimed a trial by jury. For what, then, is the additional penalty of eighty dollars, or the additional imprisonment for thirty days, inflicted? If the offence remains the same, and the offender has done nothing but claim an appeal, in order to have his case tried by a jury, must not these additional penalties be founded on the exercise of that right? Here, also, it is manifest that this right is not secured by the Constitution, but is wholly under the control of the legislative power, if it can annex penalties to the exercise of the right.

These proceedings are clearly criminal in their nature. Their object is to inflict upon the person fine or imprisonment, and at the same time to adjudicate a forfeiture of the liquors. The process, and the judicial action under it, are directed both against the offender and his property. It is true the warrant does not require the officer to arrest any one, but only to seize and hold the property, and summon the owner or keeper, if known to him. But the arrest of property to compel an appearance is a known and effectual mode of proceeding against the owner of that property. Indeed, all mesne process, both civil and criminal, which results in giving bail for an appearance, is only a mode of binding a certain amount of property to a forfeiture on non-appearance. And when this law provides that the property is to be seized and detained, and adjudged forfeited if the owner or keeper fail to appear; and, if he do appear, that he shall be fined or imprisoned, if found guilty,—it has

brought into action a criminal process both against the owner and his property. That spirituous or intoxicating liquors are still property, notwithstanding this act, is certain. The act nowhere declares the contrary; and it recognizes them as property by providing for the appointment of public agents, to buy and sell them, by expressly declaring that they may lawfully be held by chemists and others, and by not interfering with the title to them, under any circumstances, unless they are held in some town in the State, for sale within that town. Indeed, the very terms employed to describe the judgment to be entered by the justice of the peace, "they shall be adjudged forfeited," "and the owner shall pay a fine," &c., are applicable only to property, and clearly imply that there is deemed to be some title to be devested, something for such a judgment to operate upon, and something which, until forfeiture, had an owner.

This being a criminal prosecution, directed against person and property, having for its end both fine or imprisonment and forfeiture, it becomes necessary to compare the law authorizing this prosecution with another requirement of the tenth section of the first article of the Constitution of the State, already quoted. The accused is "to be informed of the nature and cause of the accusation." This act does not require that any particular person should be charged; and, in the case at bar, the complaint charges no one. It merely sets forth that the complainants have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited in several buildings which are mentioned, or in the yards or cellars thereto belonging, and are intended for sale in the city of Providence, by a person not authorized to sell the same. Whether these particular liquors, or others seized at the same time and claimed by different persons, were referred to; whether the plaintiff who owned these liquors, or some other person in whose care they were left, had this unlawful intent,—is not stated or shown by the complaint. There being no accu-

sation whatever against the plaintiff, how can he be said to be informed of its nature and cause? When the Constitution requires that the accused should be informed of the nature and cause of the accusation, it clearly implies that there is to be an accusation against him. An accusation against another, or against no one in particular, is not such an accusation as will satisfy this clause of the Constitution. It stands in the same article which demands a conformity to the "law of the land,"—that is, due process of law,—and should be interpreted as requiring that certainty which the common law has deemed essential to the protection of the accused. Certainty, in respect to the person charged, is not the least essential particular to which the constitutional requisition extends. *Sandford v. Nichols*, 13 Mass. 286; *Reed v. Rice*, 2 J. J. Marsh. 45; *Commonwealth v. Davis*, 11 Pick. 432; *Commonwealth v. Phillips*, 16 Pick. 211. If the complaint had charged the owner of particular liquors, so described as to be capable of being distinguished from all others, with an unlawful attempt to sell them, perhaps this might be sufficient; though, when it is borne in mind that this is a proceeding *in personam* as well as *in rem*, such a mode of presentment would be novel, especially as applied to a case in which the unlawful intent of a particular person is the substance of the offence. But here it does not appear the owner was intended to be charged. The complaint alleges only that some person has this unlawful intent; but whether the owner, or some person to whom he had confided the possession, or a mere wrong-doer who had possession, does not appear. Nor is there any description of the property capable of distinguishing it from all other of like kind, and consequently of identifying the owner, if he should appear, as the person intended to be charged. The only description given is that the property is liquors, spirituous or intoxicating; and that they are in one or all of three storehouses mentioned in the complaint, or in the cellars or yards belonging thereto. If it should turn out,

as it did in this case, that more than one person had, or claimed to have, such liquors in one of those places, how is the accusation to be treated, and which claimant is to be selected as the one to be tried, and who is to make the selection; or, under a complaint charging a person, to the complainants unknown, with a criminal intent, is a trial to be had of all claimants who may appear, however numerous they may be? The complainants having sworn that some one person is believed by them to be guilty, is the justice to go on and try all comers till he finds some one guilty, and there stop and discharge the rest, or proceed and convict two or three, or any other number, if he find evidence enough under a complaint against one only?

But this is by no means the only difficulty. The accused has an absolute right to a trial by jury. He has also a right to be so charged that, when that trial takes place, the jury shall pass upon the whole charge, so far as it involves matter of fact, and under the direction of the court shall apply the law to all mixed questions of law and fact.

Now, if the owner of liquors seized reach a jury trial by an appeal, and the quantity of liquors seized exceed five gallons, the court is required to adjudge him "a common seller of intoxicating liquors," and he is to be punished accordingly. But the complaint does not charge him with being such a common seller, nor with having and intending to sell over five gallons; and no such fact is required to be or can be put to the jury, to be tried. Yet upon this fact the judgment that he is guilty of a distinct offence, and the higher punishment appropriate to that offence, are rested. So that he is to be convicted of this higher offence without being charged with it, and without a trial by jury, of one of the facts essential to constitute it.

It is urged, however, that nevertheless this may be a valid proceeding against the property, although the court could not thus convict the person. If this were simply a proceeding to forfeit property, it would nevertheless be a

criminal prosecution within the meaning of this clause in the Constitution; and the owner would be entitled to a trial by jury, and to have the accusation relied upon to work the forfeiture set forth substantially, in accordance with the rules of the common law, so that he could discern its nature and cause. And I should more than doubt whether a complaint stating only that some liquors were in one or all of several buildings mentioned, and were intended by some person to be sold, would be sufficient. Suppose it is all admitted, *non constat*, that the liquors seized are those referred to, or that their owner, or any person to whom he had intrusted the possession, had any unlawful intent. It may be so, but it also may not be so; and a criminal charge, not only according to the rules of common law, but from the nature of the thing, should at least contain enough to show that, if true, the appropriate punishment should be inflicted. Yet here all that the complaint avers may be true, and yet the property of the plaintiff never held for sale in Providence, by him or his agent. It is to be borne in mind that this complaint is not merely the ground for issuing a warrant of search, and for the arrest and detention of the property, but it is the sole basis for judicial action afterwards. It is the only presentment of the offence; and therefore, if the proceeding was to result only in a forfeiture of property, I should still consider the complaint as so deficient in the requisite certainty as to be bad for that cause.

But it is not possible thus to separate the proceedings under this act against the property from the proceedings against the person on appeal. The court is to order the property to be destroyed only in the event "if the final decision shall be against the appellant." If there is no accusation upon which the appellant can lawfully be tried, there can be no final decision against him, and the property cannot be destroyed.

When this writ of replevin was served, this property was held under an order of forfeiture, which was invalid, for

two reasons: first, because there was no sufficient complaint; and, secondly, because the plaintiff was deprived of his property by a criminal prosecution, in which he neither had, nor could have, a trial by jury, without submitting to conditions which the legislature had no constitutional power to impose.

In general, a judicial act is not void, but voidable only; and, therefore, it is necessary to consider whether this order comes within that class of acts which are only voidable by some appropriate legal proceeding in the same case, or was absolutely void.

An order made by a justice of the peace concerning a matter not within his jurisdiction is void; and he and all ministerial officers who execute that order are trespassers. *Wise v. Withers*, 3 Cranch, 331; Cowp. 140; 7 B. & C. 536; 5 M. & S. 314; 11 Conn. 95; 7 Wend. 200.

Such an order confers no authority to detain property, and is not a defence to an action of replevin by its owner. The inquiry, therefore, is whether the magistrate had jurisdiction to make this order; and I am of opinion that he had not.

It has already been stated that this is a criminal prosecution. So far as this law attempts to confer jurisdiction upon justices of the peace to inflict fine and forfeiture, a trial by jury being at the same time denied, unless the accused should comply with conditions to which he is not bound to submit, it is in conflict with the Constitution, and is wholly inoperative.

The legislature may confer on justices of the peace power to punish offences; but it must be so done as to preserve unimpaired the right of trial by jury: otherwise, the whole proceeding is void *ab initio*. The Constitution declares that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." The act now under consideration provides that the right shall not be enjoyed in all criminal prosecutions, but

under this act only in those cases in which security shall be given to pay all fines and costs.

It is not practicable to consider the grant of jurisdiction to the justice valid, and the condition imposed on the exercise of the right of appeal void, because an appeal in a criminal case can exist only by force of a statute; and, if the statute has given it only on certain conditions, the magistrate must execute his judgment, and cannot allow the appeal; and the Appellate Court cannot entertain it unless those conditions are complied with. In substance, it is a grant of final jurisdiction to a justice of the peace, in all cases in which such security is not given; and this is such a criminal jurisdiction as cannot be created under the Constitution of Rhode Island.

I am of opinion also that the complaint in this case was so defective as to render all proceedings under it void. Here also the rule is that, if the process, though erroneous, is voidable only, it must be avoided by some proper legal proceedings; and, while it stands, they who act under it are not trespassers. But this is not an authorized legal proceeding in which an error has occurred. The complaint is in the form required by the act. The difficulty is that the act has authorized a criminal prosecution founded on a complaint which is not "due process of law." This act, so far as it authorizes such a prosecution, being in conflict with the Constitution, is inoperative; and it seems to be a necessary conclusion that it confers no jurisdiction to receive and proceed upon such a complaint.

This may be illustrated by supposing a law authorizing a criminal prosecution without any complaint. In such case, there could be no doubt that the whole proceeding would be absolutely void. I think it would be difficult to make a sound distinction between no complaint and one which does not satisfy this requisition of the Constitution, which, therefore, is no legal complaint, and is not "due process of law," within the definition by

Lord Coke of the words "law of the land" in *Magna Charta*.

It has long been settled (*Martin v. Marshall*, Hob. 63) that the magistrate must not only have a jurisdiction of the subject-matter, but of the process. And if the law conferring jurisdiction is fatally defective as respects the process,—which is the foundation of the jurisdiction,—the jurisdiction does not exist. *Grumond v. Raymond*, 1 Conn. 40.

For both these reasons, I am of opinion that the proceedings before the Court of Magistrates were inoperative to devest the owner of this property of his legal rights; and, consequently, neither the taking nor detention are justified by the avowry.

Several other questions have been argued at the bar in this case, but I do not find it necessary to consider them. They involve important rights under the Constitution and laws of the State. If any case should come here for judgment requiring their decision, I shall pass upon them. This case is determined without doing so.

My opinion is that there should be a judgment for the plaintiff upon the demurrer; and, if he claims damages for the taking and detention, their amount must be assessed by a jury.

## A CHARGE

DELIVERED TO THE GRAND JURY OF THE UNITED STATES  
CIRCUIT COURT FOR THE DISTRICT OF MASSACHUSETTS,  
JUNE 7, 1854.

ON THE OFFENCE OF OBSTRUCTING PROCESS OF THE  
UNITED STATES.

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The occurrences which led to this charge are stated *ante*, vol. i.  
chap. vii.

THERE is another criminal law of the United States to  
which I must call your attention, and give you in charge.  
It was enacted on the 13th of April, 1790, and is in the  
following words:—

“If any person shall knowingly or wilfully obstruct, resist, or  
oppose any officer of the United States in serving or attempting to  
serve or execute any mesne process or warrant, or any rule or  
order of any of the courts of the United States, or any other legal  
writ or process whatever, or shall assault, beat, or wound any officer  
or other person duly authorized, in serving or executing any writ,  
rule, order, process, or warrant aforesaid, such person shall on con-  
viction be imprisoned not exceeding twelve months, and fined not  
exceeding three hundred dollars.”

You will observe, gentlemen, that this law makes no provi-  
sion for a case where an officer or other person duly authorized  
is killed by those unlawfully resisting him. That is a case of  
murder, and is left to be tried and punished under the laws  
of the State within whose jurisdiction the offence is com-  
mitted. Over that offence against the laws of the State of  
Massachusetts we have here no jurisdiction. It is to be  
presumed that the duly constituted authorities of the State

will in any such case do their duty, and, if the crime of murder has been committed, will prosecute and punish all who are guilty.

Our duty is limited to administering the laws of the United States; and, by one of those laws which I have read to you, to obstruct, resist, or oppose, or beat, or wound any officer of the United States, or other person duly authorized in serving or executing any legal process whatsoever, is an offence against the laws of the United States, and is one of the subjects concerning which you are bound to inquire.

It is not material that the same act is an offence both against the laws of the United States and of a particular State. Under our system of government, the United States and the several States are distinct sovereignties, each having its own system of criminal law which it administers in its own tribunals; and the criminal laws of a State can in no way affect those of the United States. The offence, therefore, of obstructing legal process of the United States is to be inquired of and treated by you as a misdemeanor, under the Act of Congress which I have quoted, without any regard to the criminal laws of the State or the nature of the crime under these laws.

This Act of Congress is carefully worded, and its meaning is plain. Nevertheless, there are some terms in it and some rules of law connected with it which should be explained for your guidance. And, first, as to the process the execution of which is not to be obstructed.

The language of the act is very broad. It embraces every legal process whatsoever, whether issued by a court in session or by a judge or magistrate or commissioner acting in the due administration of any law of the United States. You will probably experience no difficulty in understanding and applying this part of the law.

As to what constitutes an obstruction, it was many years ago decided by Justice Washington that to support an

indictment under this law it was not necessary to prove the accused used or even threatened active violence. Any obstruction to the free action of the officer or his lawful assistants, wilfully placed in his or their way for the purpose of thus obstructing him or them, is sufficient. And it is clear that if a multitude of persons should assemble even in a public highway, with the design to stand together, and thus prevent the officer from passing freely along the way in the execution of his precept, and the officer should thus be hindered or obstructed, this would, of itself and without any active violence, be such an obstruction as is contemplated by this law. If to this be added use of any active violence, then the officer is not only obstructed, but he is resisted and opposed ; and of course the offence is complete, for either of them is sufficient to constitute it.

If you should be satisfied that an offence against this law has been perpetrated, you will then inquire by whom ; and this renders it necessary for me to instruct you concerning the kind and amount of participation which brings individuals within the compass of this law.

And, first, all who are present and actually obstruct, resist, or oppose, are of course guilty. So are all who are present leagued in the common design, and so situated as to be able in case of need to afford assistance to those actually engaged, though they do not actually obstruct, resist, or oppose. If they are present for the purpose of affording assistance in obstructing, resisting, or opposing the officers, and are so situated as to be able, in any event which may occur, actually to aid in the common design, though no overt act is done by them, they are still guilty under this law. The offence defined by this act is a misdemeanor ; and it is a rule of law that whatever participation in case of felony would render a person guilty, either as a principal in the second degree or as an accessory before the fact, does in a case of misdemeanor render him guilty as a principal : in misdemeanors, all are principals. And therefore, in pursuance of the same rule,

not only those who are present, but those who, though absent when the offence was committed, did procure, counsel, command, or abet others to commit the offence, are indictable as principals.

Such is the law; and it would seem that no just mind could doubt its propriety. If persons having influence over others use that influence to induce the commission of crime, while they themselves remain at a safe distance, that must be deemed a very imperfect system of law which allows them to escape with impunity. Such is not our law. It treats such advice as criminal, and subjects the giver of it to punishment according to the nature of the offence to which his pernicious counsel has led. If it be a case of felony, he is by the common law an accessory before the fact, and by the laws of the United States and of this State is punishable to the same extent as the principal felon. If it be a case of misdemeanor, the adviser is himself a principal offender, and is to be indicted and punished as if he himself had done the criminal act. It may be important for you to know what in point of law amounts to such an advising or counselling another as will be sufficient to constitute this legal element in the offence. It is laid down by high authority that though a mere tacit acquiescence or words which amount to a bare permission will not be sufficient, yet such a procurement may be either by direct means, as by hire, counsel, or command; or indirect, by evincing an express liking, approbation, or assent to another's criminal design. From the nature of the case, the law can prescribe only general rules on this subject. My instruction to you is that language addressed to persons who immediately afterwards commit an offence, actually intended by the speaker to incite those addressed to commit it, and adapted thus to incite them, is such a counselling or advising to the crime as the law contemplates, and the person so inciting others is liable to be indicted as a principal.

In the case of the *Commonwealth v. Bowen*, 13 Mass. 359,

which was an indictment for counselling another to commit suicide, tried in 1816, Chief Justice Parker, instructing the jury and speaking for the Supreme Court of Massachusetts, said:—

“The government is not bound to prove that Jewett would not have hung himself, had Bowen’s counsel never reached his ear. The very act of advising to the commission of a crime is of itself unlawful. The presumption of law is that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise; as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given. It was said in the argument that Jewett’s abandoned and depraved character furnishes ground to believe that he would have committed the act without such advice from Bowen. Without doubt, he was a hardened and depraved wretch; but it is in man’s nature to revolt at self-destruction. When a person is predetermined upon the commission of this crime, the seasonable admonitions of a discreet and respected friend would probably tend to overthrow his determination. On the other hand, the counsel of an unprincipled wretch, stating the heroism and courage the self-murderer displays, might induce, encourage, and fix the intention, and ultimately procure the perpetration of the dreadful deed; and, if other men would be influenced by such advice, the presumption is that Jewett was so influenced. He might have been influenced by many powerful motives to destroy himself. Still, the inducements might have been insufficient to procure the actual commission of the act, and one word of additional advice might have turned the scale.”

When applied — as this ruling seems to have been here applied — to a case in which the advice was nearly connected in point of time with the criminal act, it is in my opinion correct. If the advice was intended by the giver to stir or incite to a crime,—if it was of such a nature as to be adapted to have this effect, and the persons incited immediately afterwards committed that crime,—it is a just presumption that they were influenced by the advice or incitement to commit it. The circumstances or direct proof may or may not be sufficient to control this presumption;

and whether they are so can duly be determined in each case, upon all its evidence.

One other rule of law on this subject is necessary to be borne in mind: the substantive offence to which the advice or incitement applied must have been committed; and it is for that alone the adviser or procurer is legally accountable. Thus, if one should counsel another to rescue one prisoner, and he should rescue another unless by mistake; or if the incitement was to rescue a prisoner and he commit a larceny, the inciter is not responsible. But it need not appear that the precise time or place or means advised were used. Thus if one incite A to murder B, but advise him to wait until B shall be at a certain place at noon, and A murders B at a different place in the morning, the adviser is guilty. So if the incitement be to poison, and the murderer shoots or stabs. So if the counsel be to beat another, and he is beaten to death, the adviser is a murderer; for, having incited another to commit an unlawful act, he is responsible for all that ensues upon its execution.

These illustrations are drawn from cases of felonies, because they are the most common in the books and the most striking in themselves; but the principles on which they depend are equally applicable to cases of misdemeanor. In all such cases, the real question is whether the accused did procure, counsel, command, or abet the substantive offence committed. If he did, it is of no importance that his advice or directions were departed from in respect to the time or place or precise mode or means of committing it.

Gentlemen, the events which have recently occurred in this city have rendered it my duty to call your attention to these rules of law, and to direct you to inquire whether in point of fact the offence of obstructing process of the United States has been committed: if it has, you will present for trial all such persons as have so participated therein as to be guilty of that offence. And you will allow me to say to you that if you or I were to begin to make discriminations

between one law and another, and say this we will enforce and that we will not enforce, we should not only violate our oaths, but, so far as in us lies, we should destroy the liberties of our country, which rest for their basis upon the great principle that our country is governed by laws constitutionally enacted, and not by men.

In one part of our country, the extradition of fugitives from labor is odious; in another, if we may judge from some transactions, the law concerning the extradition of fugitives from justice has been deemed not binding; in another still, the tariff laws of the United States were considered oppressive and not fit to be enforced.

Who can fail to see that the government would cease to be a government, if it were to yield obedience to those local opinions? While it stands, all its laws must be faithfully executed, or it becomes the mere tool of the strongest faction of the place and the hour. If forcible resistance to one law be permitted practically to repeal it, the power of the mob would inevitably become one of the constituted authorities of the State, to be used against any law or any man obnoxious to the interests and passions of the worst or most excited part of the community; and the peaceful and the weak would be at the mercy of the violent.

It is the imperative duty of all of us concerned in the administration of the laws to see to it that they are firmly, impartially, and certainly applied to every offence, whether a particular law be by us individually approved or disapproved. And it becomes all to remember that forcible and concerted resistance to any law is civil war, which can make no progress but through bloodshed, and can have no termination but the destruction of the government of our country or the ruin of those engaged in such resistance. It is not my province to comment on events which have recently happened. They are matters of fact which, so far as they are connected with the criminal laws of the United States, are for your consideration. I feel no doubt that, as good

212 PROFESSIONAL AND MISCELLANEOUS WRITINGS.

citizens and lovers of our country and as conscientious men, you will well and truly observe and keep the oath you have taken, diligently to inquire and true presentment make of all crimes and offences against the laws of the United States given you in charge.<sup>1</sup>

<sup>1</sup> Law Reporter, August, 1854.

## DISSENTING OPINION

IN THE

CASE OF DRED SCOTT *versus* SANDFORD.DELIVERED IN THE SUPREME COURT OF THE UNITED STATES,  
MARCH 27, 1857.

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The facts in this case, and the questions arising on the record, are fully explained, *ante*, vol. i. p. 194, *et seq.*

I DISSENT from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case. The plaintiff alleged in his declaration that he was a citizen of the State of Missouri, and that the defendant was a citizen of the State of New York. It is not doubted that it was necessary to make each of these allegations to sustain the jurisdiction of the Circuit Court. The defendant denied by a plea to the jurisdiction, either sufficient or insufficient, that the plaintiff was a citizen of the State of Missouri. The plaintiff demurred to that plea. The Circuit Court adjudged the plea insufficient; and the first question for our consideration is whether the sufficiency of that plea is before this court for judgment upon this writ of error. The part of the judicial power of the United States conferred by Congress on the Circuit Courts being limited to certain described cases and controversies, the question whether a particular case is within the cognizance of a Circuit Court may be raised by a plea to the jurisdiction of such court. When that question has been raised, the Circuit Court must in the first instance pass upon and

determine it. Whether its determination be final, or subject to review by this appellate court, must depend upon the will of Congress; upon which body the Constitution has conferred the power, with certain restrictions, to establish inferior courts, to determine their jurisdiction, and to regulate the appellate power of this court. The twenty-second section of the Judiciary Act of 1789, which allows a writ of error from final judgments of Circuit Courts, provides that there shall be no reversal in this court, on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court. Accordingly it has been held, from the origin of the court to the present day, that Circuit Courts have not been made by Congress the final judges of their own jurisdiction in civil cases; and that when a record comes here upon a writ of error or appeal, and on its inspection it appears to this court that the Circuit Court had not jurisdiction, its judgment must be reversed, and the cause remanded, to be dismissed for want of jurisdiction.

It is alleged by the defendant in error, in this case, that the plea to the jurisdiction was a sufficient plea; that it shows, on inspection of its allegations, confessed by the demurrer, that the plaintiff was not a citizen of the State of Missouri; that, upon this record, it must appear to this court that the case was not within the judicial power of the United States, as defined and granted by the Constitution, because it was not a suit by a citizen of one State against a citizen of another State.

To this it is answered, first, that the defendant, by pleading over, after the plea to the jurisdiction was adjudged insufficient, finally waived all benefit of that plea.

When that plea was adjudged insufficient, the defendant was obliged to answer over. He held no alternative. He could not stop the further progress of the case in the Circuit Court by a writ of error, on which the sufficiency of his plea to the jurisdiction could be tried in this court,

because the judgment on that plea was not final, and no writ of error would lie. He was forced to plead to the merits. It cannot be true, then, that he waived the benefit of his plea to the jurisdiction by answering over. Waiver includes consent. Here there was no consent. And, if the benefit of the plea was finally lost, it must be, not by any waiver, but because the laws of the United States have not provided any mode of reviewing the decision of the Circuit Court on such a plea, when that decision is against the defendant. This is not the law. Whether the decision of the Circuit Court on a plea to the jurisdiction be against the plaintiff or against the defendant, the losing party may have any alleged error in law, in ruling such a plea, examined in this court on a writ of error, when the matter in controversy exceeds the sum or value of two thousand dollars. If the decision be against the plaintiff, and his suit dismissed for want of jurisdiction, the judgment is technically final; and he may at once sue out his writ of error. *Mollan v. Torrance*, 9 Wheat. 537. If the decision be against the defendant, though he must answer over, and wait for a final judgment in the cause, he may then have his writ of error, and upon it obtain the judgment of this court on any question of law apparent on the record, touching the jurisdiction. The fact that he pleaded over to the merits under compulsion can have no effect on his right to object to the jurisdiction. If this were not so, the condition of the two parties would be grossly unequal. For, if a plea to the jurisdiction were ruled against the plaintiff, he could at once take his writ of error, and have the ruling reviewed here; while, if the same plea were ruled against the defendant, he must not only wait for a final judgment, but could in no event have the ruling of the Circuit Court upon the plea reviewed by this court. I know of no ground for saying that the laws of the United States have thus discriminated between the parties to a suit in its courts.

It is further objected that, as the judgment of the Circuit

Court was in favor of the defendant, and the writ of error in this cause was sued out by the plaintiff, the defendant is not in a condition to assign any error in the record, and therefore this court is precluded from considering the question whether the Circuit Court had jurisdiction.

The practice of this court does not require a technical assignment of errors. (See the rule.) Upon a writ of error, the whole record is open for inspection; and, if any error be found in it, the judgment is reversed. *Bank of United States v. Smith*, 11 Wheat. 171.

It is true, as a general rule, that the court will not allow a party to rely on any thing as cause for reversing a judgment which was for his advantage. In this we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure. The cases on this subject are collected in Bac. Abr. Error H. 4. And this court followed this practice in *Capron v. Van Noorden*, 2 Cranch, 126, where the plaintiff below procured the reversal of a judgment for the defendant, on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction.

But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court on the merits, when it appears on the record by a plea to the jurisdiction that it is a case to which the judicial power of the United States does not extend. The course of the court is, where no motion is made by either party on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown negatively, by a plea to the jurisdiction, that jurisdiction

does not exist, but even where it does not appear, affirmatively, that it does exist. *Pequignot v. The Pennsylvania R.R. Co.*, 16 How. 104. It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. *Cutler v. Rae*, 7 How. 729. I consider, therefore, that, when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this court is *sua sponte*, if not moved to it by either party, to examine the sufficiency of that plea; and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power.

I proceed, therefore, to examine the plea to the jurisdiction. //

I do not perceive any sound reason why it is not to be judged by the rules of the common law applicable to such pleas. It is true, where the jurisdiction of the Circuit Court depends on the citizenship of the parties, it is incumbent on the plaintiff to allege on the record the necessary citizenship; but, when he has done so, the defendant must interpose a plea in abatement, the allegations whereof show that the court has not jurisdiction, and it is incumbent on him to prove the truth of his plea.

In *Sheppard v. Graves*, 14 How. 27, the rules on this subject are thus stated in the opinion of the court: "That although, in the courts of the United States, it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken *prima facie* as existing; and it is incumbent on him who would impeach that jurisdiction for causes *dehors* the pleading to allege and prove such causes; that the necessity for the allegation, and the burden of sustaining it by proof, both rest upon the party

taking the exception." These positions are sustained by the authorities there cited, as well as by *Wickliffe v. Owings*, 17 How. 47.

When, therefore, as in this case, the necessary averments as to citizenship are made on the record, and jurisdiction is assumed to exist, and the defendant comes by a plea to the jurisdiction to displace that presumption, he occupies, in my judgment, precisely the position described in Bacon Abr. Abatement: "Abatement, in the general acceptation of the word, signifies a plea put in by the defendant, in which he shows cause to the court why he should not be impleaded; or, if at all, not in the manner and form he now is."

This being, then, a plea in abatement to the jurisdiction of the court, I must judge of its sufficiency by those rules of the common law applicable to such pleas.

The plea was as follows: "And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action, and each and every of them (if any such have accrued to the said Dred Scott), accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri; for that, to wit, the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves; and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid."

The plaintiff demurred, and the judgment of the Circuit Court was that the plea was insufficient.

I cannot treat this plea as a general traverse of the citizenship alleged by the plaintiff. Indeed, if it were so

treated, the plea was clearly bad; for it concludes with a verification, and not to the country, as a general traverse should. And, though this defect in a plea in bar must be pointed out by a special demurrer, it is never necessary to demur specially to a plea in abatement: all matters, though of form only, may be taken advantage of upon a general demurrer to such a plea. Chitty on Pleading, 465.

The truth is that, though not drawn with the utmost technical accuracy, it is a special traverse of the plaintiff's allegation of citizenship, and was a suitable and proper mode of traverse under the circumstances. By reference to Mr. Stephen's description of the uses of such a traverse, contained in his excellent analysis of pleading (Stephen on Pleading, 176), it will be seen how precisely this plea meets one of his descriptions. No doubt, the defendant might have traversed, by a common or general traverse, the plaintiff's allegation that he was a citizen of the State of Missouri, concluding to the country. The issue thus presented being joined would have involved matter of law, on which the jury must have passed, under the direction of the court. But, by traversing the plaintiff's citizenship specially,—that is, averring those facts on which the defendant relied to show that, in point of law, the plaintiff was not a citizen, and basing the traverse on those facts as a deduction therefrom,—opportunity was given to do what was done; that is, to present directly to the court by a demurrer the sufficiency of those facts to negative, in point of law, the plaintiff's allegation of citizenship. This, then, being a special and not a general or common traverse, the rule is settled that the facts thus set out in the plea as the reason or ground of the traverse must of themselves constitute, in point of law, a negative of the allegation thus traversed. Stephen on Pleading, 183; Chitty on Pleading, 620. And, upon a demurrer to this plea, the question which arises is whether the facts that the plaintiff is a negro of African descent, whose ancestors were of pure African blood, and

were brought into this country and sold as negro slaves, may all be true, and yet the plaintiff be a citizen of the State of Missouri within the meaning of the Constitution and laws of the United States, which confer on citizens of one State the right to sue citizens of another State in the Circuit Courts. Undoubtedly, if these facts, taken together, amount to an allegation that at the time of action brought the plaintiff was himself a slave, the plea is sufficient. It has been suggested that the plea, in legal effect, does so aver, because, if his ancestors were sold as slaves, the presumption is they continued slaves; and, if so, the presumption is the plaintiff was born a slave; and, if so, the presumption is he continued to be a slave to the time of action brought.

I cannot think such presumptions can be resorted to, to help out defective averments in pleading; especially in pleading in abatement, where the utmost certainty and precision are required. Chitty on Pleading, 457. That the plaintiff himself was a slave at the time of action brought is a substantive fact, having no necessary connection with the fact that his parents were sold as slaves. For they might have been sold after he was born; or the plaintiff himself, if once a slave, might have become a freeman before action brought. To aver that his ancestors were sold as slaves is not equivalent, in point of law, to an averment that he was a slave. If it were, he could not even confess and avoid the averment of the slavery of his ancestors, which would be monstrous; and, if it be not equivalent in point of law, it cannot be treated as amounting thereto when demurred to; for a demurrer confesses only those substantive facts which are well pleaded, and not other distinct substantive facts which might be inferred therefrom by a jury. To treat an averment that the plaintiff's ancestors were Africans, brought to this country and sold as slaves, as amounting to an averment on the record that he was a slave, because it may lay some foundation for presuming so, is to hold that the facts

actually alleged may be treated as intended as evidence of another distinct fact not alleged. But it is a cardinal rule of pleading laid down in *Dowman's Case* (9 Rep. 9 b), and in even earlier authorities therein referred to, "that evidence shall never be pleaded, for it only tends to prove matter of fact; and therefore the matter of fact shall be pleaded." Or, as the rule is sometimes stated, pleadings must not be argumentative. Stephen on Pleading, 384, and authorities cited by him. In Com. Dig. Pleader E. 3, and Bac. Abridgment, Pleas I, 5, and Stephen on Pleading, many decisions under this rule are collected. In trover, for an indenture whereby A granted a manor, it is no plea that A did not grant the manor, for it does not answer the declaration except by argument. Yelv. 223.

So in trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods. The court said, "This is an infallible argument that the defendant is not guilty, but it is no plea." Dyer, 43 *a*.

In ejectment, the defendant pleaded a surrender of a copyhold by the hand of Fosset, the steward. The plaintiff replied that Fosset was not steward. The court held this no issue, for it traversed the surrender only argumentatively. Cro. Eliz. 260.

In these cases, and many others reported in the books, the inferences from the facts stated were irresistible. But the court held they did not, when demurred to, amount to such inferable facts. In the case at bar, the inference that the defendant was a slave at the time of action brought, even if it can be made at all, from the fact that his parents were slaves, is certainly not a necessary inference. This case, therefore, is like that of *Digby v. Alexander*, 8 Bing. 116. In that case, the defendant pleaded many facts strongly tending to show that he was once Earl of Stirling; but as there was no positive allegation that he was so at the time of action brought, and as every fact averred might be

true, and yet the defendant not have been Earl of Stirling at the time of action brought, the plea was held to be insufficient.

A lawful seisin of land is presumed to continue. But if, in an action of trespass *quare clausum*, the defendant were to plead that he was lawfully seised of the *locus in quo* one month before the time of the alleged trespass, I should have no doubt it would be a bad plea. See *Mullan v. Torrance*, 9 Wheat. 537. So if a plea to the jurisdiction, instead of alleging that the plaintiff was a citizen of the same State as the defendant, were to allege that the plaintiff's ancestors were citizens of that State, I think the plea could not be supported. My judgment would be—as it is in this case—that, if the defendant meant to aver a particular substantive fact as existing at the time of action brought, he must do it directly and explicitly, and not by way of inference from certain other averments, which are quite consistent with the contrary hypothesis. I cannot therefore treat this plea as containing an averment that the plaintiff himself was a slave at the time of action brought; and the inquiry recurs whether the facts that he is of African descent, and that his parents were once slaves, are necessarily inconsistent with his own citizenship in the State of Missouri, within the meaning of the Constitution and laws of the United States.

In *Gassies v. Ballon*, 6 Pet. 761, the defendant was described on the record as a naturalized citizen of the United States, residing in Louisiana. The court held this equivalent to an averment that the defendant was a citizen of Louisiana; because a citizen of the United States, residing in any State of the Union, is, for purposes of jurisdiction, a citizen of that State. Now, the plea to the jurisdiction in this case does not controvert the fact that the plaintiff resided in Missouri at the date of the writ. If he did then reside there, and was also a citizen of the United States, no provisions contained in the Constitution or laws of Missouri can deprive the plaintiff of his right to sue citizens

of States other than Missouri in the courts of the United States.

So that, under the allegations contained in this plea and admitted by the demurrer, the question is whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States. If any such person can be a citizen, this plaintiff has the right to the judgment of the court that he is so; for no cause is shown by the plea why he is not so, except his descent and the slavery of his ancestors.

The first section of the second article of the Constitution uses the language: "a citizen of the United States at the time of the adoption of the Constitution." One mode of approaching this question is to inquire who were citizens of the United States at the time of the adoption of the Constitution.

Citizens of the United States at the time of the adoption of the Constitution can have been no other than citizens of the United States under the Confederation. By the Articles of Confederation, a Government was organized, the style whereof was "The United States of America." This Government was in existence when the Constitution was framed and proposed for adoption, and was to be superseded by the new Government of the United States of America, organized under the Constitution. When, therefore, the Constitution speaks of the citizenship of the United States existing at the time of the adoption of the Constitution, it must necessarily refer to citizenship under the Government which existed prior to and at the time of such adoption.

Without going into any question concerning the powers of the Confederation to govern the territory of the United States out of the limits of the States, and consequently to sustain the relation of Government and citizen in respect to the inhabitants of such territory, it may safely be said that the citizens of the several States were citizens of the United States under the Confederation.

That Government was simply a confederacy of the several States, possessing a few defined powers over subjects of general concern, each State retaining every power, jurisdiction, and right not expressly delegated to the United States in Congress assembled. And no power was thus delegated to the Government of the Confederation to act on any question of citizenship, or to make any rules in respect thereto. The whole matter was left to stand upon the action of the several States, and to the natural consequence of such action, that the citizens of each State should be citizens of that Confederacy into which that State had entered, the style whereof was "The United States of America."

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

The Supreme Court of North Carolina in the case of *The State v. Manuel*, 4 Dev. & Bat. 20, has declared the law of that State on this subject in terms which I believe to be as sound law in the other States I have enumerated as it was in North Carolina.

"According to the laws of this State," says Judge Gaston, in delivering the opinion of the court, "all human beings within it, who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman laws

between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did in the British colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity, the disqualification of slavery, was removed, they became persons, and were then either British subjects or not British subjects, according as they were or were not born within the allegiance of the British King. Upon the Revolution, no other change took place in the laws of North Carolina than was consequent on the transition from a colony dependent on a European King to a free and sovereign State. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, remained aliens. Slaves, manumitted here, became freemen, and therefore, if born within North Carolina, are citizens of North Carolina; and all free persons born within the State are born citizens of the State. The Constitution extended the elective franchise to every freeman who had arrived at the age of twenty-one, and paid a public tax; and it is a matter of universal notoriety that under it free persons, without regard to color, claimed and exercised the franchise, until it was taken from free men of color a few years since by our amended Constitution."

In *The State v. Newcomb*, 5 Ired. 253, decided in 1844, the same court referred to this case of *The State v. Manuel*, and said: "That case underwent a very laborious investigation, both by the bar and the bench. The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence and authority on all questions of a similar character."

An argument from speculative premises, however well chosen, that the then state of opinion in the Commonwealth of Massachusetts was not consistent with the natural rights of people of color who were born on that soil, and that they were not, by the Constitution of 1780 of that State, admitted to the condition of citizens, would be received with surprise by the people of that State, who know their own political history. It is true, beyond all controversy, that persons of color, descended from African slaves, were by that Constitution made citizens of the State; and such of them as have had the necessary qualifications have held and exercised the elective franchise as citizens from that time to the present. See *Commonwealth v. Aves*, 18 Pick. 210.

The Constitution of New Hampshire conferred the elective franchise upon "every inhabitant of the State having the necessary qualifications,"—of which color or descent was not one.

The Constitution of New York gave the right to vote to "every male inhabitant who shall have resided," &c.,—making no discrimination between free colored persons and others. See Const. of New York, Art. 2; Rev. Stats. of New York, vol. i. p. 126.

That of New Jersey, to "all inhabitants of this colony, of full age, who are worth £50 proclamation money, clear estate."

New York, by its Constitution of 1820, required colored persons to have some qualifications as prerequisites for voting, which white persons need not possess. And New Jersey, by its present Constitution, restricts the right to vote to white male citizens. But these changes can have no other effect upon the present inquiry, except to show that before they were made no such restrictions existed; and colored in common with white persons were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts. I shall not enter into an

examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who asserted in the Declaration of Independence that all men are created equal ; that they are endowed by their Creator with certain inalienable rights ; that among these are life, liberty, and the pursuit of happiness. My own opinion is, that a calm comparison of these assertions of universal abstract truths, and of their own individual opinions and acts, would not leave these men under any reproach of inconsistency ; that the great truths they asserted on that solemn occasion they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow ; and that it would not be just to them nor true in itself to allege that they intended to say that the Creator of all men had endowed the white race exclusively with the great natural rights which the Declaration of Independence asserts. But this is not the place to vindicate their memory. As I conceive, we should deal here, not with such disputes,—if there can be a dispute concerning this subject,—but with those substantial facts evinced by the written constitutions of States, and by the notorious practice under them. And they show, in a manner which no argument can obscure, that, in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States.

The fourth of the fundamental articles of the Confederation was as follows : “ The free inhabitants of each of these States — paupers, vagabonds, and fugitives from justice excepted — shall be entitled to all the privileges and immunities of free citizens in the several States.”

The fact that free persons of color were citizens of some of the several States, and the consequence that this fourth article of the Confederation would have the effect to confer on such persons the privileges and immunities of general

citizenship, were not only known to those who framed and adopted those articles, but the evidence is decisive that the fourth article was intended to have that effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected.

On the 25th of June, 1778, the Articles of Confederation being under consideration by the Congress, the delegates from South Carolina moved to amend this fourth article by inserting after the word "free," and before the word "inhabitants," the word "white," so that the privileges and immunities of general citizenship would be secured only to white persons. Two States voted for the amendment, eight States against it, and the vote of one State was divided. The language of the article stood unchanged; and both by its terms of inclusion, "free inhabitants," and the strong implication from its terms of exclusion, "paupers, vagabonds, and fugitives from justice," who alone were excepted, it is clear that under the Confederation, and at the time of the adoption of the Constitution, free colored persons of African descent might be, and by reason of their citizenship in certain States were, entitled to the privileges and immunities of general citizenship of the United States.

Did the Constitution of the United States deprive them or their descendants of citizenship?

That Constitution was ordained and established by the people of the United States, through the action in each State of those persons who were qualified by its laws to act thereon in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of "the people of the United States," by whom the Constitution was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages upon the question of its adoption. It would be strange if we were to find in that instrument

any thing which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which *proprio vigore* deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws. And my opinion is that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.

I will proceed to state the grounds of that opinion.

The first section of the second article of the Constitution uses the language, "a natural-born citizen." It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth. At the Declaration of Independence, and ever since, the received general doctrine has been in conformity with the common law, that free persons born within either of the colonies were subjects of the king; that by the Declaration of Independence, and the consequent acquisition of sovereignty by the several States, all such persons ceased to be subjects and became citizens of the several States, except so far as some of them were disfranchised by the legislative power of the States, or availed themselves seasonably of the right to adhere to the British Crown in the civil contest, and thus to continue British subjects. *McIlvain v. Coxe's Lessee*, 4 Cranch, 209; *Inglis v. Sailors' Snug Harbor*, 3 Peters, 99; *Shanks v. Dupont*, *Ibid.* 242.

The Constitution having recognized the rule that persons

born within the several States are citizens of the United States, one of four things must be true:—

First, that the Constitution itself has described what native-born persons shall or shall not be citizens of the United States; or

Second, that it has empowered Congress to do so; or

Third, that all free persons, born within the several States, are citizens of the United States; or

Fourth, that it is left to each State to determine what free persons, born within its limits, shall be citizens of such State, and thereby be citizens of the United States.

If there be such a thing as citizenship of the United States acquired by birth within the States, which the Constitution expressly recognizes, and no one denies, then these four alternatives embrace the entire subject, and it only remains to select that one which is true.

That the Constitution itself has defined citizenship of the United States by declaring what persons, born within the several States, shall or shall not be citizens of the United States, will not be pretended. It contains no such declaration. We may dismiss the first alternative, as without doubt unfounded.

Has it empowered Congress to enact what free persons, born within the several States, shall or shall not be citizens of the United States?

Before examining the various provisions of the Constitution which may relate to this question, it is important to consider for a moment the substantial nature of this inquiry. It is, in effect, whether the Constitution has empowered Congress to create privileged classes within the States, who alone can be entitled to the franchises and powers of citizenship of the United States. If it be admitted that the Constitution has enabled Congress to declare what free persons, born within the several States, shall be citizens of the United States, it must at the same time be admitted that it is an unlimited power. If this subject is within the

control of Congress, it must depend wholly on its discretion. For, certainly, no limits of that discretion can be found in the Constitution, which is wholly silent concerning it; and the necessary consequence is that the Federal Government may select classes of persons within the several States who alone can be entitled to the political privileges of citizenship of the United States. If this power exists, what persons born within the States may be President or Vice-President of the United States, or members of either House of Congress, or hold any office or enjoy any privilege whereof citizenship of the United States is a necessary qualification, must depend solely on the will of Congress. By virtue of it, though Congress can grant no title of nobility, they may create an oligarchy, in whose hands would be concentrated the entire power of the Federal Government.

It is a substantive power, distinct in its nature from all others; capable of affecting not only the relations of the States to the General Government, but of controlling the political condition of the people of the United States. Certainly, we ought to find this power granted by the Constitution, at least by some necessary inference, before we can say it does not remain to the States or the people. I proceed therefore to examine all the provisions of the Constitution which may have some bearing on this subject.

Among the powers expressly granted to Congress is "the power to establish a uniform rule of naturalization." It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this would do violence to the meaning of the term naturalization, fixed in the common law (Co. Litt. 8 *a*, 129 *a*; 2 Ves. Sen. 286; 2 Bl. Com. 293), and in the minds of those who concurred in framing and adopting the Constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a native-born citizen that it was employed in the Declaration

of Independence. It was in this sense it was expounded in the "Federalist," No. 42; has been understood by Congress, by the Judiciary, 2 Wheat. 259, 269; 3 Wash. 313, 322; 12 Wheat. 277; and by commentators on the Constitution, 3 Story's Com. on Con. 1-3; 1 Rawle on Con. 84-88; 1 Tucker's Bl. Com. App. 255-259.

It appears, then, that the only power expressly granted to Congress to legislate concerning citizenship is confined to the removal of the disabilities of foreign birth.

Whether there be any thing in the Constitution from which a broader power may be implied will best be seen when we come to examine the two other alternatives, which are whether all free persons born on the soil of the several States, or only such of them as may be citizens of each State respectively, are thereby citizens of the United States. The last of these alternatives, in my judgment, contains the truth.

Undoubtedly, as has already been said, it is a principle of public law, recognized by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. But it must be remembered that, though the Constitution was to form a government, and under it the United States of America were to be one united sovereign nation, to which loyalty and obedience on the one side, and from which protection and privileges on the other would be due, yet the several sovereign States whose people were then citizens were not only to continue in existence, but with powers unimpaired except so far as they were granted by the people to the National Government.

Among the powers unquestionably possessed by the several States was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts: first, the

power to remove the disabilities of alienage either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts; second, determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several States; third, what native-born persons should be citizens of the United States.

The first-named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped. Construing a constitution containing only limited and defined powers of government, the argument derived from this definite and restricted power to establish a rule of naturalization must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the Constitution. But when this particular subject of citizenship was under consideration, and in the clause specially intended to define the extent of power concerning it we find a particular part of this entire power separated from the residue and conferred on the General Government, there arises a strong presumption that this is all which is granted, and that the residue is left to the States and to the people. And this presumption is, in my opinion, converted into a certainty by an examination of all such other clauses of the Constitution as touch this subject.

I will examine each which can have any possible bearing on this question.

The first clause of the second section of the third article of the Constitution is: "The judicial power shall extend to controversies between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between States, or the citizens thereof, and foreign States, citizens, or subjects." I do not think this clause has any considerable bearing upon the particular inquiry now under consideration. Its purpose was to extend the

judicial power to those controversies into which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill-will between different States, or a particular State and a foreign nation. At the same time, I would remark, in passing, that it has never been held—I do not know that it has ever been supposed—that any citizen of a State could bring himself under this clause and the eleventh and twelfth sections of the Judiciary Act of 1789, passed in pursuance of it, who was not a citizen of the United States. But I have referred to the clause only because it is one of the places where citizenship is mentioned by the Constitution. Whether it is entitled to any weight in this inquiry or not, it refers only to citizenship of the several States; it recognizes that; but it does not recognize citizenship of the United States as something distinct therefrom.

As has been said, the purpose of this clause did not necessarily connect it with citizenship of the United States, even if that were something distinct from citizenship of the several States, in the contemplation of the Constitution. This cannot be said of other clauses of the Constitution, which I now proceed to refer to.

“The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.” Nowhere else in the Constitution is there any thing concerning a general citizenship; but here privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and as such the privileges and immunities of general citizenship,

derived from and guaranteed by the Constitution, are to be enjoyed by them. It would seem that if it had been intended to constitute a class of native-born persons within the States, who should derive their citizenship of the United States from the action of the Federal Government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States.

And, if it was intended to secure these rights only to citizens of the United States, how has the Constitution here described such persons? Simply as citizens of each State.

But, further: though, as I shall presently more fully state, I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship under the American constitutions; and the just and constitutional possession of this right is decisive evidence of citizenship. The provisions made by a constitution on this subject must therefore be looked to as bearing directly on the question what persons are citizens under that constitution; and as being decisive to this extent, that all such persons as are allowed by the Constitution to exercise the elective franchise, and thus to participate in the Government of the United States, must be deemed citizens of the United States.

Here, again, the consideration presses itself upon us that, if there was designed to be a particular class of native-born persons within the States, deriving their citizenship from the Constitution and laws of the United States, they should at least have been referred to as those by whom the President and House of Representatives were to be elected, and to whom they should be responsible.

Instead of that, we again find this subject referred to the laws of the several States. The electors of President are to be appointed in such manner as the legislature of each

State may direct, and the qualifications of electors of members of the House of Representatives shall be the same as for electors of the most numerous branch of the State legislature.

Laying aside, then, the case of aliens, concerning which the Constitution of the United States has provided, and confining our view to free persons born within the several States, we find that the Constitution has recognized the general principle of public law, that allegiance and citizenship depend on the place of birth; that it has not attempted practically to apply this principle by designating the particular classes of persons who should or should not come under it; that when we turn to the Constitution for an answer to the question, What free persons, born within the several States, are citizens of the United States? the only answer we can receive from any of its express provisions is, The citizens of the several States are to enjoy the privileges and immunities of citizens in every State, and their franchise as electors under the Constitution depends on their citizenship in the several States. Add to this that the Constitution was ordained by the citizens of the several States; that they were "the people of the United States," for whom and whose posterity the Government was declared in the preamble of the Constitution to be made; that each of them was "a citizen of the United States at the time of the adoption of the Constitution," within the meaning of those words in that instrument; that by them the Government was to be and was in fact organized; and that no power is conferred on the Government of the Union to discriminate between them or to disfranchise any of them,—the necessary conclusion is that those persons born within the several States who, by force of their respective constitutions and laws, are citizens of the State, are thereby citizens of the United States.

It may be proper here to notice some supposed objections to this view of the subject.

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original States colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true in point of fact that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by any thing in the Constitution, but contradicted by its opening declaration that it was ordained and established by the people of the United States for themselves and their posterity. And, as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.

Again, it has been objected that, if the Constitution has left to the several States the rightful power to determine who of their inhabitants shall be citizens of the United States, the States may make aliens citizens.

The answer is obvious. The Constitution has left to the States the determination what persons, born within their respective limits, shall acquire by birth citizenship of the United States: it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress.

It has been further objected that, if free colored persons, born within a particular State, and made citizens of that State by its constitution and laws, are thereby made citizens of the United States, then, under the second section of the fourth article of the Constitution, such persons would be entitled to all the privileges and immunities of citizens in the several States; and, if so, then colored persons could vote, and be eligible to not only Federal offices, but offices even in those States whose constitutions and laws dis-

qualify colored persons from voting or being elected to office.

But this position rests upon an assumption which I deem untenable. Its basis is that no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizen. See 1 Lit. Kentucky, 326. That this is not true under the Constitution of the United States, seems to me clear.

A naturalized citizen cannot be President of the United States, nor a Senator till after the lapse of nine years, nor a Representative till after the lapse of seven years from his naturalization. Yet as soon as naturalized he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia or of either of the Territories eligible to the office of Senator or Representative in Congress, though he may be a citizen of the United States. So, in all the States, numerous persons, though citizens, cannot vote or cannot hold office, either on account of their age or sex, or the want of the necessary legal qualifications. The truth is that citizenship under the Constitution of the United States is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided is a question to be determined by each State in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.

One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age or under guardianship because insane or spend-thrifts, be excluded from voting or holding office, or allowed

to do so, I apprehend no one will deny that they are citizens of the United States. Besides, this clause of the Constitution does not confer on the citizens of one State in all other States specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not to such as belong to particular citizens attended by other qualifications. Privileges and immunities which belong to certain citizens of a State by reason of the operation of causes other than mere citizenship are not conferred. Thus, if the laws of a State require, in addition to citizenship of the State, some qualification for office or the exercise of the elective franchise, citizens of all other States coming thither to reside, and not possessing those qualifications, cannot enjoy those privileges, not because they are not to be deemed entitled to the privileges of citizens of the State in which they reside, but because they, in common with the native-born citizens of that State, must have the qualifications prescribed by law for the enjoyment of such privileges under its constitution and laws. It rests with the States themselves so to frame their constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship. If one of the States will not deny to any of its own citizens a particular privilege or immunity, if it confer it on all of them by reason of mere naked citizenship, then it may be claimed by every citizen of each State by force of the Constitution; and it must be borne in mind that the difficulties which attend the allowance of the claims of colored persons to be citizens of the United States are not avoided by saying that, though each State may make them its citizens, they are not thereby made citizens of the United States, because the privileges of general citizenship are secured to the citizens of each State. The language of the Constitution is, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." If each State may make such persons its citizens, they become as such entitled to the benefits of this article, if there be a native-born citizen-

ship of the United States distinct from a native-born citizenship of the several States.

There is one view of this article entitled to consideration in this connection. It is manifestly copied from the fourth of the Articles of Confederation, with only slight changes of phraseology, which render its meaning more precise, and dropping the clause which excluded paupers, vagabonds, and fugitives from justice,—probably because these cases could be dealt with under the police powers of the States, and a special provision therefor was not necessary. It has been suggested that, in adopting it into the Constitution, the words “free inhabitants” were changed for the word “citizens.” An examination of the forms of expression commonly used in the State Papers of that day, and an attention to the substance of this article of the Confederation, will show that the words “free inhabitants,” as then used, were synonymous with citizens. When the Articles of Confederation were adopted, we were in the midst of the war of the Revolution; and there were very few persons then embraced in the words “free inhabitants” who were not born on our soil. It was not a time when many, save the children of the soil, were willing to embark their fortunes in our cause; and, though there might be an inaccuracy in the uses of words to call free inhabitants citizens, it was then a technical rather than a substantial difference. If we look into the Constitutions and State Papers of that period, we find the inhabitants or people of these colonies, or the inhabitants of this State or Commonwealth employed to designate those whom we should now denominate citizens. The substance and purpose of the article prove it was in this sense it used these words: it secures to the free inhabitants of each State the privileges and immunities of free citizens in every State. It is not conceivable that the States should have agreed to extend the privileges of citizenship to persons not entitled to enjoy the privileges of citizens in the States where they dwelt; that under this article

there was a class of persons in some of the States, not citizens, to whom were secured all the privileges and immunities of citizens when they went into other States ; and the just conclusion is that, though the Constitution cured an inaccuracy of language, it left the substance of this article in the National Constitution the same as it was in the Articles of Confederation.

The history of this fourth article, respecting the attempt to exclude free persons of color from its operation, has been already stated. It is reasonable to conclude that this history was known to those who framed and adopted the Constitution. That under this fourth article of the Confederation free persons of color might be entitled to the privileges of general citizenship, if otherwise entitled thereto, is clear. When this article was in substance placed in and made part of the Constitution of the United States, with no change in its language calculated to exclude free colored persons from the benefit of its provisions, the presumption is, to say the least, strong that the practical effect which it was designed to have and did have under the former Government, it was designed to have and should have under the new Government.

It may be further objected that, if free colored persons may be citizens of the United States, it depends only on the will of a master whether he will emancipate his slave, and thereby make him a citizen. Not so. The master is subject to the will of the State. Whether he shall be allowed to emancipate his slave at all ; if so, on what conditions ; and what is to be the political *status* of the freed man,—depend, not on the will of the master, but on the will of the State, upon which the political *status* of all its native-born inhabitants depends. Under the Constitution of the United States, each State has retained this power of determining the political *status* of its native-born inhabitants, and no exception thereto can be found in the Constitution. And if a master in a slaveholding State should carry his slave into a

free State, and there emancipate him, he would not thereby make him a native-born citizen of that State, and consequently no privileges could be claimed by such emancipated slave as a citizen of the United States. For, whatever powers the States may exercise to confer privileges of citizenship on persons not born on their soil, the Constitution of the United States does not recognize such citizens. As has already been said, it recognizes the great principle of public law, that allegiance and citizenship spring from the place of birth. It leaves to the States the application of that principle to individual cases. It secured to the citizens of each State the privileges and immunities of citizens in every other State. But it does not allow to the States the power to make aliens citizens, or permit one State to take persons born on the soil of another State, and, contrary to the laws and policy of the State where they were born, make them its citizens, and so citizens of the United States. No such deviation from the great rule of public law was contemplated by the Constitution; and, when any such attempt shall be actually made, it is to be met by applying to it those rules of law and those principles of good faith which will be sufficient to decide it, and not, in my judgment, by denying that all the free native-born inhabitants of a State, who are its citizens under its Constitution and laws, are also citizens of the United States.

It has sometimes been urged that colored persons are shown not to be citizens of the United States by the fact that the naturalization laws apply only to white persons. But whether a person born in the United States be or be not a citizen cannot depend on laws which refer only to aliens, and do not affect the *status* of persons born in the United States. The utmost effect which can be attributed to them is to show that Congress has not deemed it expedient generally to apply the rule to colored aliens. That they might do so, if thought fit, is clear. The Constitution has not excluded them. And, since that has conferred the

power on Congress to naturalize colored aliens, it certainly shows color is not a necessary qualification for citizenship under the Constitution of the United States. It may be added that the power to make colored persons citizens of the United States under the Constitution has been actually exercised in repeated and important instances. See the Treaties with the Choctaws, of Sept. 27, 1830, art. 14; with the Cherokees, of May 23, 1836, art. 12; Treaty of Guadalupe Hidalgo, Feb. 2, 1848, art. 8.

I do not deem it necessary to review at length the legislation of Congress having more or less bearing on the citizenship of colored persons. It does not seem to me to have any considerable tendency to prove that it has been considered by the legislative department of the Government that no such persons are citizens of the United States. Undoubtedly, they have been debarred from the exercise of particular rights or privileges extended to white persons, but, I believe, always in terms which by implication admit they may be citizens. Thus the Act of May 17, 1792, for the organization of the militia, directs the enrolment of "every free, able-bodied, white male citizen." An assumption that none but white persons are citizens would be as inconsistent with the just import of this language as that all citizens are able-bodied or males.

So the Act of Feb. 28, 1803, 2 Stat. at Large, 205, to prevent the importation of certain persons into States, when by the laws thereof their admission is prohibited, in its first section forbids all masters of vessels to import or bring "any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States," &c.

The acts of March 3, 1813, § 1, 2 Stat. at Large, 809, and March 1, 1817, § 3, 3 Stat. at Large, 351, concerning seamen, certainly imply there may be persons of color, natives of the United States, who are not citizens of the United States. This implication is undoubtedly in accord-

ance with the fact. For not only slaves, but free persons of color, born in some of the States, are not citizens. But there is nothing in these laws inconsistent with the citizenship of persons of color in others of the States, nor with their being citizens of the United States.

Whether much or little weight should be attached to the particular phraseology of these and other laws, which were not passed with any direct reference to this subject, I consider their tendency to be, as already indicated, to show that, in the apprehension of their framers, color was not a necessary qualification of citizenship. It would be strange if laws were found on our statute book to that effect, when by solemn treaties large bodies of Mexican and North American Indians as well as free colored inhabitants of Louisiana have been admitted to citizenship of the United States.

In the legislative debates which preceded the admission of the State of Missouri into the Union, this question was agitated. Its result is found in the resolution of Congress, of March 5, 1821, for the admission of that State into the Union. The Constitution of Missouri, under which that State applied for admission into the Union, provided that it should be the duty of the legislature "to pass laws to prevent free negroes and mulattoes from coming to and settling in the State, under any pretext whatever." One ground of objection to the admission of the State under this Constitution was that it would require the legislature to exclude free persons of color, who would be entitled, under the second section of the fourth article of the Constitution, not only to come within the State, but to enjoy there the privileges and immunities of citizens. The resolution of Congress admitting the State was upon the fundamental condition "that the Constitution of Missouri shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto by which any citizen of either of the States of this Union shall be ex-

cluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States." It is true that neither this legislative declaration, nor any thing in the Constitution or laws of Missouri, could confer or take away any privilege or immunity granted by the Constitution. But it is also true that it expresses the then conviction of the legislative power of the United States, that free negroes, as citizens of some of the States, might be entitled to the privileges and immunities of citizens in all the States.

The conclusions at which I have arrived on this part of the case are :—

First, that the free native-born citizens of each State are citizens of the United States.

Second, that as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States.

Third, that every such citizen, residing in any State, has the right to sue and is liable to be sued in the Federal courts, as a citizen of that State in which he resides.

Fourth, that as the plea to the jurisdiction in this case shows no facts except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States and his residence in the State of Missouri, the plea to the jurisdiction was bad, and the judgment of the Circuit Court overruling it was correct.

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri Compromise Act, and the grounds and conclusions announced in their opinion.

Having first decided that they were bound to consider

the sufficiency of the plea to the jurisdiction of the Circuit Court, and having decided that this plea showed that the Circuit Court had not jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appeared on the trial before the court and jury, on the issues joined on the pleas in bar, and so have reached the question of the power of Congress to pass the act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court, as described by its repeated decisions, and, as I understand, acknowledged in this opinion of the majority of the court.

In the course of that opinion, it became necessary to comment on the case of *Legrand v. Darnall* (reported in 2 Peters, 664). In that case a bill was filed by one alleged to be a citizen of Maryland against one alleged to be a citizen of Pennsylvania. The bill stated that the defendant was the son of a white man by one of his slaves; and that the defendant's father devised to him certain lands, the title to which was put in controversy by the bill. These facts were admitted in the answer; and upon these and other facts the court made its decree, founded on the principle that a devise of land by a master to a slave was by implication also a bequest of his freedom. The facts that the defendant was of African descent, and was born a slave, were not only before the court, but entered into the entire substance of its inquiries. The opinion of the majority of my brethren in this case disposes of the case of *Legrand v. Darnall*, by saying, among other things, that, as the fact that the defendant was born a slave only came before this court on the bill and answer, it was then too late to raise the question of the personal disability of the party, and therefore that decision is altogether inapplicable in this case.

In this I concur. Since the decision of this court in

*Livingston v. Story*, 11 Peters, 351, the law has been settled that, when the declaration or bill contains the necessary averments of citizenship, this court cannot look at the record to see whether those averments are true, except so far as they are put in issue by a plea to the jurisdiction. In that case, the defendant denied by his answer that Mr. Livingston was a citizen of New York, as he had alleged in the bill. Both parties went into proofs. The court refused to examine those proofs, with reference to the personal disability of the plaintiff. This is the settled law of the court, affirmed so lately as *Shepherd v. Graves*, 14 How. 27, and *Wickliff v. Owings*, 17 How. 51. See also *De Wolf v. Rabaud*, 1 Peters, 476. But I do not understand this to be a rule which the court may depart from at its pleasure. If it be a rule, it is as binding on the court as on the suitors. If it removes from the latter the power to take any objection to the personal disability of a party alleged by the record to be competent, which is not shown by a plea to the jurisdiction, it is because the court are forbidden by law to consider and decide on objections so taken. I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri, save that raised by the plea to the jurisdiction; and I do not hold any opinion of this court or any court binding, when expressed on a question not legitimately before it. *Carroll v. Carroll*, 16 How. 275. The judgment of this court is that the case is to be dismissed for want of jurisdiction, because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.

But, as in my opinion the Circuit Court had jurisdiction, I am obliged to consider the question whether its

judgment on the merits of the case should stand or be reversed.

The residence of the plaintiff in the State of Illinois, and the residence of himself and his wife in the Territory acquired from France lying north of latitude thirty-six degrees thirty minutes, and north of the State of Missouri, are each relied on by the plaintiff in error. As the residence in the Territory affects the plaintiff's wife and children as well as himself, I must inquire what was its effect.

The general question may be stated to be whether the plaintiff's *status* as a slave was so changed by his residence within that Territory that he was not a slave in the State of Missouri at the time this action was brought.

In such cases, two inquiries arise, which may be confounded, but should be kept distinct.

The first is, What was the law of the Territory into which the master and slave went, respecting the relation between them?

The second is, whether the State of Missouri recognizes and allows the effect of that law of the Territory on the *status* of the slave, on his return within its jurisdiction.

As to the first of these questions, the will of States and nations, by whose municipal law slavery is not recognized, has been manifested in three different ways.

One is absolutely to dissolve the relation and terminate the rights of the master existing under the law of the country whence the parties came. This is said by Lord Stowell, in the case of the slave Grace (2 Hag. Ad. 94), and by the Supreme Court of Louisiana, in the case of *Maria Louise v. Marot* (8 Louis. 475), to be the law of France; and it has been the law of several States of this Union in respect to slaves introduced under certain conditions. *Wilson v. Isabel*, 5 Call, 430; *Hunter v. Hulcher*, 1 Leigh, 172; *Stewart v. Oaks*, 5 Har. & John. 107.

The second is where, the municipal law of a country not recognizing slavery, it is the will of the State to refuse the

master all aid to exercise any control over his slave ; and, if he attempt to do so in a manner justifiable only by that relation, to prevent the exercise of that control. But no law exists designed to operate directly on the relation of master and slave, and put an end to that relation. This is said by Lord Stowell, in the case above mentioned, to be the law of England, and by Mr. Chief Justice Shaw, in the case of *The Commonwealth v. Aves*, 18 Pick. 193, to be the law of Massachusetts.

The third is to make a distinction between the case of a master and his slave only temporarily in the country — *animo non manendi* — and those who are there to reside for permanent or indefinite purposes. This is said by Mr. Wheaton to be the law of Prussia, and was formerly the statute law of several States of our Union. It is necessary in this case to keep in view this distinction between those countries whose laws are designed to act directly on the *status* of a slave, and make him a free man, and those where his master can obtain no aid from the laws to enforce his rights.

It is to the last case only that the authorities out of Missouri relied on by defendant apply, when the residence in the non-slaveholding Territory was permanent. In *The Commonwealth v. Aves*, 18 Pick. 218, Mr. Chief Justice Shaw said : “ From the principle above stated, on which a slave brought here becomes free, to wit, that he becomes entitled to the protection of our laws, it would seem to follow as a necessary conclusion that, if the slave waives the protection of those laws and returns to the State where he is held as a slave, his condition is not changed. It was upon this ground, as is apparent from his whole reasoning, that Sir William Scott rests his opinion in the case of the slave Grace. To use one of his expressions, the effect of the law of England was to put the liberty of the slave into a parenthesis. If there had been an act of Parliament declaring that a slave coming to England with his master should thereby be deemed no longer to be a slave, it is easy to see

that the learned judge could not have arrived at the same conclusion. This distinction is very clearly stated and shown by President Tucker, in his opinion in the case of *Betty v. Horton*, 5 Leigh, Va. 615. See also *Hunter v. Fletcher*, 1 Leigh, Va. 172; *Maria Louise v. Marot*, 8 La. 475; *Smith v. Smith*, 13 La. 441; *Thomas v. Genevieve*, 16 La. 483; *Rankin v. Lydia*, 2 A. K. Marshall, 467; *Davies v. Tingle*, 8 B. Monroe, 539; *Griffeth v. Fanny*, Gilm. Va. 143; *Lumford v. Coquillon*, 14 Martin, La. 405; *Josephine v. Poultney*, 1 La. Ann. 329.

But, if the acts of Congress on this subject are valid, the law of the Territory of Wisconsin, within whose limits the residence of the plaintiff and his wife, and their marriage and the birth of one or both of their children took place, falls under the first category, and is a law operating directly on the *status* of the slave. By the eighth section of the act of March 6, 1820 (3 Stat. at Large, 548), it was enacted that within this Territory "slavery and involuntary servitude, otherwise than in the punishment of crimes whereof the parties shall have been duly convicted, shall be and is hereby for ever prohibited: provided always that any person escaping into the same, from whom labor or service is lawfully claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service, as aforesaid."

By the act of April 20, 1836 (4 Stat. at Large, 10), passed in the same month and year of the removal of the plaintiff to Fort Snelling, this part of the territory ceded by France, where Fort Snelling is, together with so much of the territory of the United States east of the Mississippi as now constitutes the State of Wisconsin, was brought under a Territorial Government, under the name of the Territory of Wisconsin. By the eighteenth section of this act, it was enacted: "That the inhabitants of this Territory shall be entitled to and enjoy all and singular the rights, privileges,

and advantages granted and secured to the people of the Territory of the United States north-west of the river Ohio, by the articles of compact contained in the ordinance for the government of said Territory, passed on the thirteenth day of July, 1787; and shall be subject to all the restrictions and prohibitions in said articles of compact imposed upon the people of the said Territory." The sixth article of that compact is: "There shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: provided always that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service, as aforesaid." By other provisions of this act establishing the Territory of Wisconsin, the laws of the United States, and the then existing laws of the State of Michigan, are extended over the Territory; the latter being subject to alteration and repeal by the legislative power of the Territory created by the act.

Fort Snelling was within the Territory of Wisconsin, and these laws were extended over it. The Indian title to that site for a military post had been acquired from the Sioux nation as early as Sept. 23, 1805 (Am. State Papers, Indian Affairs, vol. i. p. 744), and until the erection of the Territorial Government the persons at that post were governed by the rules and articles of war, and such laws of the United States, including the eighth section of the act of March 6, 1820, prohibiting slavery, as were applicable to their condition; but after the erection of the Territory, and the extension of the laws of the United States and the laws of Michigan over the whole of the Territory, including this military post, the persons residing there were under the dominion of those laws in all particulars to which the rules and articles of war did not apply.

It thus appears that, by these acts of Congress, not only was a general system of municipal law borrowed from the State of Michigan, which did not tolerate slavery, but it was positively enacted that slavery and involuntary servitude, with only one exception, specifically described, should not exist there. It is not simply that slavery is not recognized and cannot be aided by the municipal law. It is recognized for the purpose of being absolutely prohibited, and declared incapable of existing within the Territory, save in the instance of a fugitive slave.

It would not be easy for the legislature to employ more explicit language to signify its will that the *status* of slavery should not exist within the Territory than the words found in the act of 1820 and in the ordinance of 1787 ; and if any doubt could exist concerning their application to cases of masters coming into the Territory with their slaves to reside, that doubt must yield to the inference required by the words of exception. That exception is of cases of fugitive slaves. An exception from a prohibition marks the extent of the prohibition ; for it would be absurd as well as useless to except from a prohibition a case not contained within it. 9 Wheat. 200. I must conclude, therefore, that it was the will of Congress that the state of involuntary servitude of a slave coming into the Territory with his master should cease to exist. The Supreme Court of Missouri so held in *Rachel v. Walker*, 4 Misso. 350, which was the case of a military officer going into the Territory with two slaves.

But it is a distinct question whether the law of Missouri recognized and allowed effect to the change wrought in the *status* of the plaintiff by force of the laws of the Territory of Wisconsin.

I say the law of Missouri, because a judicial tribunal in one State or nation can recognize personal rights acquired by force of the law of any other State or nation only so far as it is the law of the former State that those rights should be recognized. But, in the absence of positive law to the con-

trary, the will of every civilized State must be presumed to be to allow such effect to foreign laws as is in accordance with the settled rules of international law. And legal tribunals are bound to act on this presumption. It may be assumed that the motive of the State in allowing such operation to foreign laws is what has been termed comity. But, as has justly been said (*per* Chief Justice Taney, 13 Pet. 589), it is the comity of the State, not of the court. The judges have nothing to do with the motive of the State. Their duty is simply to ascertain and give effect to its will. And when it is found by them that its will to depart from a rule of international law has not been manifested by the State, they are bound to assume that its will is to give effect to it. Undoubtedly, every sovereign State may refuse to recognize a change wrought by the law of a foreign State on the *status* of a person while within such foreign State, even in cases where the rules of international law require that recognition. Its will to refuse such recognition may be manifested by what we term statute law, or by the customary law of the State. It is within the province of its judicial tribunals to inquire and adjudge whether it appears, from the statute or customary law of the State, to be the will of the State to refuse to recognize such changes of *status* by force of foreign law as the rules of the law of nations require to be recognized. But, in my opinion, it is not within the province of any judicial tribunal to refuse such recognition from any political considerations, or any view it may take of the exterior political relations between the State and one or more foreign States, or any impressions it may have that a change of foreign opinion and action on the subject of slavery may afford a reason why the State should change its own action. To understand and give just effect to such considerations, and to change the action of the State in consequence of them, are functions of diplomatists and legislators, not of judges.

The inquiry to be made on this part of the case is, there-

fore, whether the State of Missouri has, by its statute or its customary law, manifested its will to displace any rule of international law applicable to a change of the *status* of a slave by foreign law.

I have not heard it suggested that there was any statute of the State of Missouri bearing on this question. The customary law of Missouri is the common law introduced by statute in 1816. 1 Ter. Laws, 436. And the common law, as Blackstone says (4 Com. 67), adopts in its full extent the law of nations, and holds it to be a part of the law of the land.

I know of no sufficient warrant for declaring that any rule of international law, concerning the recognition in that State of a change of *status* wrought by an extra-territorial law, has been displaced or varied by the will of the State of Missouri.

I proceed, then, to inquire what the rules of international law prescribe concerning the change of *status* of the plaintiff wrought by the law of the Territory of Wisconsin.

It is generally agreed by writers upon international law, and the rule has been judicially applied in a great number of cases, that, wherever any question may arise concerning the *status* of a person, it must be determined according to that law which has next previously rightfully operated on and fixed that *status*. And, further, that the laws of a country do not rightfully operate upon and fix the *status* of persons who are within its limits *in itinere*, or who are abiding there for definite temporary purposes, as for health, curiosity, or occasional business; that these laws, known to writers on public and private international law as personal statutes, operate only on the inhabitants of the country. Not that it is or can be denied that each independent nation may, if it thinks fit, apply them to all persons within their limits. But when this is done, not in conformity with the principles of international law, other States are not under-

stood to be willing to recognize or allow effect to such applications of personal statutes.

It becomes necessary, therefore, to inquire whether the operation of the laws of the Territory of Wisconsin upon the *status* of the plaintiff was or was not such an operation as these principles of international law require other States to recognize and allow effect to.

And this renders it needful to attend to the particular facts and circumstances of this case.

It appears that this case came on for trial before the Circuit Court and a jury, upon an issue, in substance, whether the plaintiff and his wife and children were the slaves of the defendant.

The court instructed the jury that, "upon the facts in this case, the law is with the defendant." This withdrew from the jury the consideration and decision of every matter of fact. The evidence in the case consisted of written admissions, signed by the counsel of the parties. If the case had been submitted to the judgment of the court upon an agreed statement of facts, entered of record in place of a special verdict, it would have been necessary for the court below and for this court to pronounce its judgment solely on those facts, thus agreed, without inferring any other facts therefrom. By the rules of the common law applicable to such a case, and by force of the seventh article of the amendments of the Constitution, this court is precluded from finding any fact not agreed to by the parties on the record. No submission to the court on a statement of facts was made. It was a trial by jury, in which certain admissions made by the parties were the evidence. The jury were not only competent, but were bound to draw from that evidence every inference which, in their judgment, exercised according to the rules of law, it would warrant. The Circuit Court took from the jury the power to draw any inferences from the admissions made by the parties, and decided the case for the defendant. This course can be

justified here, if at all, only by its appearing that, upon the facts agreed and all such inferences of fact favorable to the plaintiff's ease as the jury might have been warranted in drawing from those admissions, the law was with the defendant. Otherwise, the plaintiff would be deprived of the benefit of his trial by jury, by whom, for aught we can know, those inferences favorable to his case would have been drawn.

The material facts agreed, bearing on this part of the case, are that Dr. Emerson, the plaintiff's master, resided about two years at the military post of Fort Snelling, being a surgeon in the army of the United States, his domicile of origin being unknown; and what, if any thing, he had done to preserve or change his domicile prior to his residence at Rock Island, being also unknown.

Now it is true that under some circumstances the residence of a military officer at a particular place, in the discharge of his official duties, does not amount to the acquisition of a technical domicile. But it cannot be affirmed, with correctness, that it never does. There being actual residence, and this being presumptive evidence of domicile, all the circumstances of the case must be considered before a legal conclusion can be reached that his place of residence is not his domicile. If a military officer stationed at a particular post should entertain an expectation that his residence there would be indefinitely protracted, and in consequence should remove his family to the place where his duties were to be discharged, form a permanent domestic establishment there, exercise there the civil rights and discharge the civil duties of an inhabitant, while he did no act and manifested no intent to have a domicile elsewhere, I think no one would say that the mere fact that he was himself liable to be called away by the orders of the Government would prevent his acquisition of a technical domicile at the place of the residence of himself and his family. In other words, I do not think a military officer incapable

of acquiring a domicile. *Bruce v. Bruce*, 2 Bos. & Pul. 230; *Munroe v. Douglass*, 5 Mad. Ch. 232. This being so, this case stands thus: There was evidence before the jury that Emerson resided about two years at Fort Snelling, in the Territory of Wisconsin. This may or may not have been with such intent as to make it his technical domicile. The presumption is that it was. It is so laid down by this court in *Ennis v. Smith*, 14 How. 400, and the authorities in support of the position are there referred to. His intent was a question of fact for the jury. *Fitchburg v. Winchendon*, 4 Cush. 190.

The case was taken from the jury. If they had power to find that the presumption of the necessary intent had not been rebutted, we cannot say on this record that Emerson had not his technical domicile at Fort Snelling. But, for reasons which I shall now proceed to give, I do not deem it necessary in this case to determine the question of the technical domicile of Dr. Emerson.

It must be admitted that the inquiry whether the law of a particular country has rightfully fixed the *status* of a person, so that in accordance with the principles of international law that *status* should be recognized in other jurisdictions, ordinarily depends on the question whether the person was domiciled in the country whose laws are asserted to have fixed his *status*. But in the United States questions of this kind may arise where an attempt to decide solely with reference to technical domicile, tested by the rules which are applicable to changes of places of abode from one country to another, would not be consistent with sound principles. And, in my judgment, this is one of those cases.

The residence of the plaintiff who was taken by his master, Dr. Emerson, as a slave, from Missouri to the State of Illinois, and thence to the Territory of Wisconsin, must be deemed to have been for the time being, and until he asserted his own separate intention, the same as the residence

of his master; and the inquiry whether the personal statutes of the Territory were rightfully extended over the plaintiff, and ought, in accordance with the rules of international law, to be allowed to fix his *status*, must depend upon the circumstances under which Dr. Emerson went into that Territory, and remained there; and upon the further question whether any thing was there rightfully done by the plaintiff to cause those personal statutes to operate on him.

Dr. Emerson was an officer in the army of the United States. He went into the Territory to discharge his duty to the United States. The place was out of the jurisdiction of any particular State, and within the exclusive jurisdiction of the United States. It does not appear where the domicile of origin of Dr. Emerson was, nor whether or not he had lost it and gained another domicile, nor of what particular State, if any, he was a citizen.

On what ground can it be denied that all valid laws of the United States, constitutionally enacted by Congress for the government of the Territory, rightfully extended over an officer of the United States and his servant who went into the Territory to remain there for an indefinite length of time, to take part in its civil or military affairs? They were not foreigners coming from abroad. Dr. Emerson was a citizen of the country which had exclusive jurisdiction over the Territory; and not only a citizen, but he went there in a public capacity, in the service of the same sovereignty which made the laws. Whatever those laws might be, whether of the kind denominated personal statutes or not, so far as they were intended by the legislative will, constitutionally expressed, to operate on him and his servant, and on the relations between them, they had a rightful operation; and no other State or country can refuse to allow that those laws might rightfully operate on the plaintiff and his servant, because such a refusal would be a denial that the United States could, by laws constitution-

ally enacted, govern their own servants residing on their own Territory, over which the United States had the exclusive control, and in respect to which they are an independent sovereign power. Whether the laws now in question were constitutionally enacted, I repeat once more, is a separate question. But assuming that they were, and that they operated directly on the *status* of the plaintiff, I consider that no other State or country could question the rightful power of the United States so to legislate, or, consistently with the settled rules of international law, could refuse to recognize the effects of such legislation upon the *status* of their officers and servants, as valid everywhere.

This alone would, in my apprehension, be sufficient to decide this question.

But there are other facts stated on the record which should not be passed over. It is agreed that, in the year 1836, the plaintiff, while residing in the Territory, was married with the consent of Dr. Emerson to Harriet, named in the declaration as his wife, and that Eliza and Lizzie were the children of that marriage, the first-named having been born on the Mississippi River, north of the line of Missouri, and the other having been born after their return to Missouri. And the inquiry is whether, after the marriage of the plaintiff in the Territory, with the consent of Dr. Emerson, any other State or country can, consistently with the settled rules of international law, refuse to recognize and treat him as a free man, when suing for the liberty of himself, his wife, and the children of that marriage. It is in reference to his *status*, as viewed in other States and countries, that the contract of marriage and the birth of children become strictly material. At the same time, it is proper to observe that the female to whom he was married, having been taken to the same military post of Fort Snelling as a slave, and Dr. Emerson claiming also to be her master at the time of her marriage, her *status*, and that of the

children of the marriage, are also affected by the same considerations.

If the laws of Congress governing the Territory of Wisconsin were constitutional and valid laws, there can be no doubt these parties were capable of contracting a lawful marriage, attended with all the usual civil rights and obligations of that condition. In that Territory, they were absolutely free persons, having full capacity to enter into the civil contract of marriage.

It is a principle of international law, settled beyond controversy in England and America, that a marriage, valid by the law of the place where it was contracted, and not in fraud of the law of any other place, is valid everywhere; and that no technical domicile at the place of the contract is necessary to make it so. See Bishop on Marriage and Divorce, 125-129, where the cases are collected.

If, in Missouri, the plaintiff were held to be a slave, the validity and operation of his contract of marriage must be denied. He can have no legal rights; of course, not those of a husband and father. And the same is true of his wife and children. The denial of his rights is the denial of theirs. So that, though lawfully married in the Territory, when they came out of it, into the State of Missouri, they were no longer husband and wife; and a child of that lawful marriage, though born under the same dominion where its parents contracted a lawful marriage, is not the fruit of that marriage, nor the child of its father, but subject to the maxim, *partus sequitur ventrem*.

It must be borne in mind that in this case there is no ground for the inquiry whether it be the will of the State of Missouri not to recognize the validity of the marriage of a fugitive slave, who escapes into a State or country where slavery is not allowed, and there contracts a marriage; or the validity of such a marriage, where the master, being a citizen of the State of Missouri, voluntarily goes with his slave, *in itinere*, into a State or country which does not per-

mit slavery to exist, and the slave there contracts marriage without the consent of his master; for in this case, it is agreed, Dr. Emerson did consent; and no further question can arise concerning his rights, so far as their assertion is inconsistent with the validity of the marriage. Nor do I know of any ground for the assertion that this marriage was in fraud of any law of Missouri. It has been held by this court that a bequest of property by a master to his slave by necessary implication entitles the slave to his freedom; because only as a freeman could he take and hold the bequest. *Legrand v. Darnall*, 2 Peters, 664. It has also been held that when a master goes with his slave to reside for an indefinite period in a State where slavery is not tolerated, this operates as an act of manumission; because it is sufficiently expressive of the consent of the master that the slave should be free. 2 Marshall's Ken. 470; 14 Martin, La. 401.

What, then, shall we say of the consent of the master that the slave may contract a lawful marriage, attended with all the civil rights and duties which belong to that relation; that he may enter into a relation which none but a free man can assume,—a relation which involves not only the rights and duties of the slave, but those of the other party to the contract, and of their descendants to the remotest generation? In my judgment, there can be no more effectual abandonment of the legal rights of a master over his slave than by the consent of the master that the slave should enter into a contract of marriage in a free State, attended by all the civil rights and obligations which belong to that condition.

And any claim by Dr. Emerson, or any one claiming under him, the effect of which is to deny the validity of this marriage and the lawful paternity of the children born from it, wherever asserted, is, in my judgment, a claim inconsistent with good faith and sound reason, as well as with the rules of international law. And I go further: in my opin-

ion, a law of the State of Missouri, which should thus annul a marriage, lawfully contracted by these parties while resident in Wisconsin, not in fraud of any law of Missouri, or of any right of Dr. Emerson, who consented thereto, would be a law impairing the obligation of a contract, and within the prohibition of the Constitution of the United States. See 4 Wheat. 629, 695, 696.

To avoid misapprehension on this important and difficult subject, I will state distinctly the conclusions at which I have arrived. They are:—

First, the rules of international law respecting the emancipation of slaves, by the rightful operation of the laws of another State or country upon the *status* of the slave, while resident in such foreign State or country, are part of the common law of Missouri, and have not been abrogated by any statute law of that State.

Second, the laws of the United States, constitutionally enacted, which operated directly on and changed the *status* of a slave coming into the Territory of Wisconsin with his master, who went thither to reside for an indefinite length of time, in the performance of his duties as an officer of the United States, had a rightful operation on the *status* of the slave; and it is in conformity with the rules of international law that this change of *status* should be recognized everywhere.

Third, the laws of the United States, in operation in the Territory of Wisconsin at the time of the plaintiff's residence there, did act directly on the *status* of the plaintiff, and change his *status* to that of a free man.

Fourth, the plaintiff and his wife were capable of contracting, and, with the consent of Dr. Emerson, did contract a marriage in that Territory, valid under its laws; and the validity of this marriage cannot be questioned in Missouri, save by showing that it was in fraud of the laws of that State, or of some right derived from them; which cannot be shown in this case, because the master consented to it.

Fifth, that the consent of the master that his slave, residing in a country which does not tolerate slavery, may enter into a lawful contract of marriage, attended with the civil rights and duties which belong to that condition, is an effectual act of emancipation. And the law does not enable Dr. Emerson, or any one claiming under him, to assert a title to the married persons as slaves, and thus destroy the obligation of the contract of marriage, and bastardize their issue, and reduce them to slavery.

But it is insisted that the Supreme Court of Missouri has settled this case by its decision in *Scott v. Emerson*, 15 Mo. 576; and that this decision is in conformity with the weight of authority elsewhere, and with sound principles. If the Supreme Court of Missouri had placed its decision on the ground that it appeared Dr. Emerson never became domiciled in the Territory, and so its laws could not rightfully operate on him and his slave; and the facts that he went there to reside indefinitely, as an officer of the United States, and that the plaintiff was lawfully married there, with Dr. Emerson's consent, were left out of view,—the decision would find support in other cases, and I might not be prepared to deny its correctness. But the decision is not rested on this ground. The domicile of Dr. Emerson in that Territory is not questioned in that decision; and it is placed on a broad denial of the operation, in Missouri, of the law of any foreign State or country upon the *status* of a slave, going with his master from Missouri into such foreign State or country, even though they went thither to become, and actually became, permanent inhabitants of such foreign State or country, the laws whereof acted directly on the *status* of the slave, and changed his *status* to that of a freeman.

To the correctness of such a decision I cannot assent. In my judgment, the opinion of the majority of the court in that case is in conflict with its previous decisions, with a great weight of judicial authority in other slaveholding

States, and with fundamental principles of private international law. Mr. Chief Justice Gamble, in his dissenting opinion in that case, said:—

“I regard the question as conclusively settled by repeated adjudications of this court; and, if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them, than I would any other series of decisions by which the law upon any other question had been settled. There is with me nothing in the law of slavery which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary excitements which have gathered around it . . . But, in the midst of all such excitement, it is proper that the judicial mind, calm and self-balanced, should adhere to principles established when there was no feeling to disturb the view of the legal questions upon which the rights of parties depend.”

“In this State, it has been recognized from the beginning of the government, as a correct position in law, that the master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave.” *Winney v. Whitesides*, 1 Mo. 473; *Le Grange v. Chouteau*, 2 Mo. 20; *Milley v. Smith*, Id. 36; *Ralph v. Duncan*, 3 Mo. 194; *Julia v. McKinney*, Id. 270; *Nat v. Ruddle*, Id. 400; *Rachel v. Walker*, 4 Mo. 350; *Wilson v. Melvin*, Id. 592.

Chief Justice Gamble has also examined the decisions of the courts of other States in which slavery is established, and finds them in accordance with these preceding decisions of the Supreme Court of Missouri to which he refers.

It would be a useless parade of learning for me to go over the ground which he has so fully and ably occupied.

But it is further insisted we are bound to follow this decision. I do not think so. In this case, it is to be determined what laws of the United States were in operation in the Territory of Wisconsin, and what was their effect on the *status* of the plaintiff. Could the plaintiff contract a lawful marriage there? Does any law of the State of Missouri impair the obligation of that contract of marriage,

destroy his rights as a husband, bastardize the issue of the marriage, and reduce them to a state of slavery?

These questions, which arise exclusively under the Constitution and laws of the United States, this court, under the Constitution and laws of the United States, has the rightful authority finally to decide. And, if we look beyond these questions, we come to the consideration whether the rules of international law, which are part of the laws of Missouri until displaced by some statute not alleged to exist, do or do not require the *status* of the plaintiff, as fixed by the laws of the Territory of Wisconsin, to be recognized in Missouri. Upon such a question, not depending on any statute or local usage, but on principles of universal jurisprudence, this court has repeatedly asserted it could not hold itself bound by the decisions of State courts, however great respect might be felt for their learning, ability, and impartiality. See *Swift v. Tyson*, 16 Peters, 1; *Carpenter v. The Providence Ins. Co.*, Id. 495; *Foxcroft v. Mallet*, 4 How. 353; *Rowan v. Runnels*, 5 How. 134.

Some reliance has been placed on the fact that the decision in the Supreme Court of Missouri was between these parties, and the suit there was abandoned to obtain another trial in the courts of the United States.

In *Homer v. Brown*, 16 How. 354, this court made a decision upon the construction of a devise of lands, in direct opposition to the unanimous opinion of the Supreme Court of Massachusetts, between the same parties, respecting the same subject-matter, — the claimant having become *nousuit* in the State court, in order to bring his action in the Circuit Court of the United States. I did not sit in that case, having been of counsel for one of the parties while at the bar; but, on examining the report of the argument of the counsel for the plaintiff in error, I find they made the point that this court ought to give effect to the construction put upon the will by the State court, to the end that rights respecting lands may be governed by one law, and that the law of

the place where the lands are situated; that they referred to the State decision of the case, reported in 3 *Cush.* 390, and to many decisions of this court. But this court does not seem to have considered the point of sufficient importance to notice it in their opinions. In *Millar v. Austin*, 13 *How.* 218, an action was brought by the indorsee of a written promise. The question was whether it was negotiable under a statute of Ohio. The Supreme Court of that State having decided it was not negotiable, the plaintiff became nonsuit, and brought his action in the Circuit Court of the United States. The decision of the Supreme Court of the State, reported in 4 *Ves. L. J.* 527, was relied on. This court unanimously held the paper to be negotiable.

When the decisions of the highest court of a State are directly in conflict with each other, it has been repeatedly held here that the last decision is not necessarily to be taken as the rule. *State Bank v. Knoop*, 16 *How.* 369; *Pease v. Peck*, 18 *How.* 599.

To these considerations I desire to add that it was not made known to the Supreme Court of Missouri, so far as appears, that the plaintiff was married in Wisconsin with the consent of Dr. Emerson; and it is not made known to us that Dr. Emerson was a citizen of Missouri, a fact to which that court seem to have attached much importance.

Sitting here to administer the law between these parties, I do not feel at liberty to surrender my own convictions of what the law requires to the authority of the decision in 15 Missouri Reports.

I have thus far assumed, merely for the purpose of the argument, that the laws of the United States respecting slavery in this Territory were constitutionally enacted by Congress. It remains to inquire whether they are constitutional and binding laws.

In the argument of this part of the case at bar, it was justly considered by all the counsel to be necessary to ascertain the source of the power of Congress over the territory

belonging to the United States. Until this is ascertained, it is not possible to determine the extent of that power. On the one side, it was maintained that the Constitution contains no express grant of power to organize and govern what is now known to the laws of the United States as a Territory. That whatever power of this kind exists is derived by implication from the capacity of the United States to hold and acquire territory out of the limits of any State, and the necessity for its having some government.

On the other side, it was insisted that the Constitution has not failed to make an express provision for this end, and that it is found in the third section of the fourth article of the Constitution.

To determine which of these is the correct view, it is needful to advert to some facts respecting this subject, which existed when the Constitution was framed and adopted. It will be found that these facts not only shed much light on the question whether the framers of the Constitution omitted to make a provision concerning the power of Congress to organize and govern Territories, but they will also aid in the construction of any provision which may have been made respecting this subject.

Under the Confederation, the unsettled territory within the limits of the United States had been a subject of deep interest. Some of the States insisted that these lands were within their chartered boundaries, and that they had succeeded to the title of the Crown to the soil. On the other hand, it was argued that the vacant lands had been acquired by the United States by the war carried on by them under a common government and for the common interest.

This dispute was further complicated by unsettled questions of boundary among several States. It not only delayed the accession of Maryland to the Confederation, but at one time seriously threatened its existence. 5 Jour. of Cong. 208, 442. Under the pressure of these circumstances, Congress earnestly recommended to the several

States a cession of their claims and rights to the United States. 5 Jour. of Cong. 442. And before the Constitution was framed, it had been begun. That by New York had been made on the first day of March, 1781; that of Virginia, on the first day of March, 1784; that of Massachusetts, on the nineteenth day of April, 1785; that of Connecticut, on the fourteenth day of September, 1786; that of South Carolina, on the eighth day of August, 1787, while the Convention for framing the Constitution was in session.

It is very material to observe, in this connection, that each of these acts cedes, in terms, to the United States, as well the jurisdiction as the soil.

It is also equally important to note that, when the Constitution was framed and adopted, this plan of vesting in the United States, for the common good, the great tracts of ungranted lands claimed by the several States, in which so deep an interest was felt, was yet incomplete. It remained for North Carolina and Georgia to cede their extensive and valuable claims. These were made by North Carolina on the twenty-fifth day of February, 1790, and by Georgia on the twenty-fourth day of April, 1802. The terms of these last-mentioned cessions will hereafter be noticed in another connection; but I observe here that each of them distinctly shows upon its face that they were not only in execution of the general plan proposed by the Congress of the Confederation, but of a formed purpose of each of these States existing when the assent of their respective people was given to the Constitution of the United States.

It appears, then, that, when the Federal Constitution was framed and presented to the people of the several States for their consideration, the unsettled territory was viewed as justly applicable to the common benefit, so far as it then had or might attain thereafter a pecuniary value; and so far as it might become the seat of new States to be admitted into the Union upon an equal footing with the original States. And also that the relations of the United

States to that unsettled territory were of different kinds. The titles of the States of New York, Virginia, Massachusetts, Connecticut, and South Carolina, as well of soil as of jurisdiction, had been transferred to the United States. North Carolina and Georgia had not actually made transfers ; but a confident expectation, founded on their appreciation of the justice of the general claim, and fully justified by the results, was entertained that these cessions would be made. The ordinance of 1787 had made provision for the temporary government of so much of the territory actually ceded as lay north-west of the river Ohio.

But it must have been apparent, both to the framers of the Constitution and the people of the several States who were to act upon it, that the government thus provided for could not continue, unless the Constitution should confer on the United States the necessary powers to continue it. That temporary government, under the ordinance, was to consist of certain officers, to be appointed by and responsible to the Congress of the Confederation : their powers had been conferred and defined by the ordinance. So far as it provided for the temporary government of the Territory, it was an ordinary act of legislation, deriving its force from the legislative power of Congress, and depending for its vitality upon the continuance of that legislative power. But the officers to be appointed for the North-western Territory, after the adoption of the Constitution, must necessarily be officers of the United States, and not of the Congress of the Confederation ; appointed and commissioned by the President, and exercising powers derived from the United States under the Constitution.

Such was the relation between the United States and the North-western Territory, which all reflecting men must have foreseen would exist, when the government created by the Constitution should supersede that of the Confederation. That if the new government should be without power to govern this Territory, it could not appoint and commission

officers and send them into the Territory, to exercise there legislative, judicial, and executive power; and that this Territory, which was even then foreseen to be so important both politically and financially to all the existing States, must be left not only without the control of the general government, in respect to its future political relations to the rest of the States, but absolutely without any government save what its inhabitants, acting in their primary capacity, might from time to time create for themselves.

But this North-western Territory was not the only territory the soil and jurisdiction whereof were then understood to have been ceded to the United States. The cession by South Carolina, made in August, 1787, was of "all the territory included within the river Mississippi and a line beginning at that part of the said river which is intersected by the southern boundary of North Carolina, and continuing along the said boundary line until it intersects the ridge or chain of mountains which divides the Eastern from the Western waters ; then to be continued along the top of the said ridge of mountains until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo River to the said mountains, and thence to run a due west course to the river Mississippi."

It is true that by subsequent explorations it was ascertained that the source of the Tugaloo River, upon which the title of South Carolina depended, was so far to the northward that the transfer conveyed only a narrow slip of land, about twelve miles wide, lying on the top of the ridge of mountains, and extending from the northern boundary of Georgia to the southern boundary of North Carolina. But this was a discovery made long after the cession; and there can be no doubt that the State of South Carolina, in making the cession, and the Congress in accepting it, viewed it as a transfer to the United States of the soil and jurisdiction of an extensive and important part of the unsettled territory ceded by the Crown of Great Britain by the treaty of

peace, though its quantity or extent then remained to be ascertained.<sup>1</sup>

It must be remembered also, as has been already stated, that not only was there a confident expectation entertained by the other States that North Carolina and Georgia would complete the plan already so far executed by New York, Virginia, Massachusetts, Connecticut, and South Carolina, but that the opinion was in no small degree prevalent that the just title to this "back country," as it was termed, had vested in the United States by the treaty of peace, and could not rightfully be claimed by any individual State.

There is another consideration applicable to this part of the subject, and entitled, in my judgment, to great weight.

The Congress of the Confederation had assumed the power not only to dispose of the lands ceded, but to institute governments and make laws for their inhabitants. In other words, they had proceeded to act under the cession, which, as we have seen, was as well of the jurisdiction as of the soil. This ordinance was passed on the 13th of July, 1787. The Convention for framing the Constitution was then in session at Philadelphia. The proof is direct and decisive that it was known to the Convention.<sup>2</sup> It is equally clear that it was admitted and understood not to be within the legitimate powers of the Confederation to pass this ordinance. Jefferson's Works, vol ix. pp. 251, 276; Federalist, Nos. 38, 43.

The importance of conferring on the new government regular powers commensurate with the objects to be attained,

<sup>1</sup> This statement that *some* territory did actually pass by this cession is taken from the opinion of the court, delivered by Mr. Justice Wayne, in the case of *Howard v. Ingersoll*, reported in 13 How. 405. It is an obscure matter; and, on some examination of it, I have been led to doubt whether any territory actually passed by this cession. But, as the fact is not important to the argument, I have not thought it necessary further to investigate it.

<sup>2</sup> It was published in a newspaper at Philadelphia, in May, and a copy of it was sent by R. H. Lee to General Washington, on the 15th of July. See Cor. of Am. Rev., vol. iv. p. 261, and Writings of Washington, vol. ix. p. 174.

and thus avoiding the alternative of a failure to execute the trust assumed by the acceptance of the cessions made and expected, or its execution by usurpation, could scarcely fail to be perceived. That it was in fact perceived is clearly shown by the Federalist (No. 38), where this very argument is made use of in commendation of the Constitution.

Keeping these facts in view, it may confidently be asserted that there is very strong reason to believe, before we examine the Constitution itself, that the necessity for a competent grant of power to hold, dispose of, and govern territory ceded and expected to be ceded, could not have escaped the attention of those who framed or adopted the Constitution; and that, if it did not escape their attention, it could not fail to be adequately provided for.

Any other conclusion would involve the assumption that a subject of the gravest national concern, respecting which the small States felt so much jealousy that it had been almost an insurmountable obstacle to the formation of the Confederation, and as to which all the States had deep pecuniary and political interests, and which had been so recently and constantly agitated, was nevertheless overlooked; or that such a subject was not overlooked, but designedly left unprovided for, though it was manifestly a subject of common concern which belonged to the care of the General Government, and adequate provision for which could not fail to be deemed necessary and proper.

The admission of new States to be framed out of the ceded territory early attracted the attention of the Convention. Among the resolutions introduced by Mr. Randolph, on the 29th of May, was one on this subject (Res. No. 10, 5 Elliot, 128), which having been affirmed in Committee of the Whole, on the 5th of June (5 Elliot, 156), and reported to the Convention on the 13th of June (5 Elliot, 190), was referred to the Committee of Detail to prepare the Constitution, on the 26th of July (5 Elliot, 376). This committee reported an article for the admission of new States

"lawfully constituted or established." Nothing was said concerning the power of Congress to prepare or form such States. This omission struck Mr. Madison, who on the 18th of August (5 Elliot, 439) moved for the insertion of power to dispose of the unappropriated lands of the United States, and to institute temporary governments for new States arising therein.

On the 29th of August (5 Elliot, 492), the report of the committee was taken up, and after debate—which exhibited great diversity of views concerning the proper mode of providing for the subject, arising out of the supposed diversity of interests of the large and small States, and between those which had and those which had not unsettled territory, but no difference of opinion respecting the propriety and necessity of some adequate provision for the subject—Gouverneur Morris moved the clause as it stands in the Constitution. This met with general approbation, and was at once adopted. The whole section is as follows: —

"New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of Congress.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State."

That Congress has some power to institute temporary governments over the territory, I believe all agree; and, if it be admitted that the necessity of some power to govern the territory of the United States could not and did not escape the attention of the Convention and the people, and that the necessity is so great that, in the absence of any express grant, it is strong enough to raise an implication of the existence of that power, it would seem to follow that it

is also strong enough to afford material aid in construing an express grant of power respecting that territory; and that they who maintain the existence of the power, without finding any words at all in which it is conveyed, should be willing to receive a reasonable interpretation of language of the Constitution manifestly intended to relate to the territory, and to convey to Congress some authority concerning it.

It would seem, also, that when we find the subject-matter of the growth and formation and admission of new States, and the disposal of the territory for these ends, were under consideration, and that some provision therefor was expressly made, it is improbable that it would be in its terms a grossly inadequate provision; and that an indispensably necessary power to institute temporary governments, and to legislate for the inhabitants of the territory, was passed silently by, and left to be deduced from the necessity of the case.

In the argument at the bar, great attention has been paid to the meaning of the word "territory."

Ordinarily, when the territory of a sovereign power is spoken of, it refers to that tract of country which is under the political jurisdiction of that sovereign power. Thus, Chief Justice Marshall (in *United States v. Bevans*, 3 Wheat. 386) says: "What, then, is the extent of jurisdiction which a State possesses? We answer without hesitation, The jurisdiction of a State is co-extensive with its territory." Examples might easily be multiplied of this use of the word, but they are unnecessary, because it is familiar. But the word "territory" is not used in this broad and general sense in this clause of the Constitution.

At the time of the adoption of the Constitution, the United States held a great tract of country north-west of the Ohio; another tract, then of unknown extent, ceded by South Carolina; and a confident expectation was then entertained, and afterwards realized, that they then were or would become the owners of other great tracts claimed by

North Carolina and Georgia. These ceded tracts lay within the limits of the United States, and out of the limits of any particular State; and the cessions embraced the civil and political jurisdiction, and so much of the soil as had not previously been granted to individuals.

These words, "territory belonging to the United States," were not used in the Constitution to describe an abstraction, but to identify and apply to these actual subjects matter then existing and belonging to the United States, and other similar subjects which might afterwards be acquired; and, this being so, all the essential qualities and incidents attending such actual subjects are embraced within the words "territory belonging to the United States," as fully as if each of those essential qualities and incidents had been specifically described.

I say, the essential qualities and incidents. But, in determining what were the essential qualities and incidents of the subject with which they were dealing, we must take into consideration, not only all the particular facts which were immediately before them, but the great consideration ever present to the minds of those who framed and adopted the Constitution,—that they were making a frame of government for the people of the United States and their posterity, under which they hoped the United States might be, what they have now become, a great and powerful nation, possessing the power to make war and to conclude treaties, and thus to acquire territory. See *Cerré v. Pitot*, 6 Cr. 336; *Am. Ins. Co. v. Canter*, 1 Peters, 542. With these in view, I turn to examine the clause of the article now in question.

It is said this provision has no application to any territory save that then belonging to the United States. I have already shown that, when the Constitution was framed, a confident expectation was entertained, which was speedily realized, that North Carolina and Georgia would cede their claims to that great territory which lay west of those States. No doubt has been suggested that the first clause of this

same article, which enabled Congress to admit new States, refers to and includes new States to be formed out of this territory, expected to be thereafter ceded by North Carolina and Georgia, as well as new States to be formed out of territory north-west of the Ohio, which then had been ceded by Virginia. It must have been seen, therefore, that the same necessity would exist for an authority to dispose of and make all needful regulations respecting this territory, when ceded, as existed for a like authority respecting territory which had been ceded.

No reason has been suggested why any reluctance should have been felt by the framers of the Constitution to apply this provision to all the territory which might belong to the United States, or why any distinction should have been made, founded on the accidental circumstance of the dates of the cessions,—a circumstance in no way material as respects the necessity for rules and regulations, or the propriety of conferring on the Congress power to make them. And, if we look at the course of the debates in the Convention on this article, we shall find that the then unceded lands, so far from having been left out of view in adopting this article, constituted, in the minds of members, a subject of even paramount importance.

Again, in what an extraordinary position would the limitation of this clause to territory then belonging to the United States place the territory which lay within the chartered limits of North Carolina and Georgia. The title to that territory was then claimed by those States and by the United States, their respective claims are purposely left unsettled by the express words of this clause; and, when cessions were made by those States, they were merely of their claims to this territory, the United States neither admitting nor denying the validity of those claims: so that it was impossible then, and has ever since remained impossible, to know whether this territory did or did not then belong to the United States; and consequently to know whether it

was within or without the authority conferred by this clause, to dispose of and make rules and regulations respecting the territory of the United States. This attributes to the eminent men who acted on this subject a want of ability and forecast, or a want of attention to the known facts upon which they were acting, in which I cannot concur.

There is not, in my judgment, any thing in the language, the history, or the subject-matter of this article, which restricts its operation to territory owned by the United States when the Constitution was adopted.

But it is also insisted that provisions of the Constitution respecting territory belonging to the United States do not apply to territory acquired by treaty from a foreign nation. This objection must rest upon the position that the Constitution did not authorize the Federal Government to acquire foreign territory, and consequently has made no provision for its government when acquired; or that, though the acquisition of foreign territory was contemplated by the Constitution, its provisions concerning the admission of new States, and the making of all needful rules and regulations respecting territory belonging to the United States, were not designed to be applicable to territory acquired from foreign nations.

It is undoubtedly true that at the date of the treaty of 1803, between the United States and France, for the cession of Louisiana, it was made a question whether the Constitution had conferred on the executive department of the Government of the United States power to acquire foreign territory by a treaty.

There is evidence that very grave doubts were then entertained concerning the existence of this power. But that there was then a settled opinion in the executive and legislative branches of the Government that this power did not exist cannot be admitted without at the same time imputing to those who negotiated and ratified the treaty, and passed the laws necessary to carry it into execution, a deliberate

and known violation of their oaths to support the Constitution; and, whatever doubts may then have existed, the question must now be taken to have been settled. Four distinct acquisitions of foreign territory have been made by as many different treaties, under as many different administrations. Six States formed on such territory are now in the Union. Every branch of this Government, during a period of more than fifty years, has participated in these transactions. To question their validity now is vain. As was said by Mr. Chief Justice Marshall, in the *Am. Ins. Co. v. Canter*, 1 Peters, 542: "The Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties: consequently, that Government possesses the power of acquiring territory, either by conquest or treaty." See *Cerré v. Pitot*, 6 Cr. 336. And I add, it also possesses the power of governing it, when acquired, not by resorting to supposititious powers, nowhere found described in the Constitution, but expressly granted in the authority to make all needful rules and regulations respecting the territory of the United States.

There was to be established by the Constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the Government, and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all territory of the United States, and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contemplated and authorized the acquisition from time to time of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument as it is with its language, and I can have no hesitation in rejecting it.

I construe this clause, therefore, as if it had read, Con-

gress shall have power to make all needful rules and regulations respecting those tracts of country out of the limits of the several States which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the soil, so far as the soil may be the property of the party making the cession, at the time of making it.

It has been urged that the words "rules and regulations" are not appropriate terms in which to convey authority to make laws for the government of the Territory.

But it must be remembered that this is a grant of power to the Congress,—that it is therefore necessarily a grant of power to legislate; and, certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a legislature to make all needful rules and regulations respecting the Territory is a power to pass all needful laws respecting it.

The word "regulate," or "regulation," is several times used in the Constitution. It is used in the fourth section of the first article, to describe those laws of the States which prescribe the times, places, and manner of choosing Senators and Representatives; in the second section of the fourth article, to designate the legislative action of a State on the subject of fugitives from service, having a very close relation to the matter of our present inquiry; in the second section of the third article, to empower Congress to fix the extent of the appellate jurisdiction of this court; and, finally, in the eighth section of the first article are the words, "Congress shall have power to regulate commerce."

It is unnecessary to describe the body of legislation which has been enacted under this grant of power: its variety and extent are well known. But it may be mentioned, in passing, that under this power to regulate commerce Congress

has enacted a great system of municipal laws, and extended it over the vessels and crews of the United States on the high seas and in foreign ports, and even over citizens of the United States resident in China ; and has established judicatures, with power to inflict even capital punishment within that country.

If, then, this clause does contain a power to legislate respecting the Territory, what are the limits of that power ?

To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things ; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder ; and so in respect to each of the other prohibitions contained in the Constitution.

Besides this, the rules and regulations must be needful. But, undoubtedly, the question whether a particular rule or regulation be needful must be finally determined by Congress itself. Whether a law be needful is a legislative or political, not a judicial question. Whatever Congress deems needful is so under the grant of power.

Nor am I aware that it has ever been questioned that laws providing for the temporary government of the settlers on the public lands are needful, not only to prepare them for admission to the Union as States, but even to enable the United States to dispose of the lands.

Without government and social order, there can be no property ; for, without law, its ownership, its use, and the power of disposing of it, cease to exist, in the sense in which those words are used and understood in all civilized States.

Since, then, this power was manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as States, when in the judgment of Congress they should be fitted therefor ; since these were the needs provided for ; since it is confessed that government is indispensable to provide for those needs, and

the power is to make all needful rules and regulations respecting the territory,—I cannot doubt that this is a power to govern the inhabitants of the territory by such laws as Congress deems needful until they obtain admission as States.

Whether they should be thus governed solely by laws enacted by Congress, or partly by laws enacted by legislative power conferred by Congress, is one of those questions which depend on the judgment of Congress,—a question which of these is needful.

But it is insisted that, whatever other powers Congress may have respecting the territory of the United States, the subject of negro slavery forms an exception.

The Constitution declares that Congress shall have power to make "all needful rules and regulations" respecting the territory belonging to the United States.

The assertion is, though the Constitution says all, it does not mean all,—though it says all, without qualification, it means all except such as allow or prohibit slavery. It cannot be doubted that it is incumbent on those who would thus introduce an exception not found in the language of the instrument to exhibit some solid and satisfactory reason, drawn from the subject-matter or the purposes and objects of the clause, the context, or from other provisions of the Constitution, showing that the words employed in this clause are not to be understood according to their clear, plain, and natural signification.

The subject-matter is the territory of the United States out of the limits of every State, and consequently under the exclusive power of the people of the United States. Their will respecting it, manifested in the Constitution, can be subject to no restriction. The purposes and objects of the clause were the enactment of laws concerning the disposal of the public lands; and the temporary government of the settlers thereon until new States should be formed. It will not be questioned that, when the Constitution of the United

States was framed and adopted, the allowance and the prohibition of negro slavery were recognized subjects of municipal legislation: every State had in some measure acted thereon; and the only legislative act concerning the territory—the ordinance of 1787, which had then so recently been passed—contained a prohibition of slavery. The purpose and object of the clause being to enable Congress to provide a body of municipal law for the government of the settlers, the allowance or the prohibition of slavery comes within the known and recognized scope of that purpose and object.

There is nothing in the context which qualifies the grant of power. The regulations must be “respecting the territory.” An enactment that slavery may or may not exist there is a regulation respecting the territory. Regulations must be needful; but it is necessarily left to the legislative discretion to determine whether a law be needful. No other clause of the Constitution has been referred to at the bar, or has been seen by me, which imposes any restriction or makes any exception concerning the power of Congress to allow or prohibit slavery in the territory belonging to the United States.

A practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind on a question of the interpretation of the Constitution. *Stuart v. Laird*, 1 Cranch, 269; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Prigg v. Pennsylvania*, 16 Pet. 621; *Cooley v. Port Wardens*, 12 How. 315.

In this view, I proceed briefly to examine the practical construction placed on the clause now in question, so far as it respects the inclusion therein of power to permit or prohibit slavery in the Territories.

It has already been stated that, after the Government of the United States was organized under the Constitution,

the temporary government of the territory north-west of the river Ohio could no longer exist, save under the powers conferred on Congress by the Constitution. Whatever legislative, judicial, or executive authority should be exercised therein, could be derived only from the people of the United States under the Constitution. And, accordingly, an act was passed on the seventh day of August, 1789 (1 Stat. at Large, 50), which recites: "Whereas, in order that the ordinance of the United States in Congress assembled, for the government of the territory north-west of the river Ohio, may continue to have full effect, it is required that certain provisions should be made, so as to adapt the same to the present Constitution of the United States." It then provides for the appointment, by the President, of all officers who, by force of the ordinance, were to have been appointed by the Congress of the Confederation, and their commission in the manner required by the Constitution; and empowers the Secretary of the Territory to exercise the powers of the Governor in case of the death or necessary absence of the latter.

Here is an explicit declaration of the will of the first Congress, of which fourteen members, including Mr. Madison, had been members of the Convention which framed the Constitution, that the ordinance, one article of which prohibited slavery, "should continue to have full effect." General Washington, who signed this bill, as President, was the president of that Convention.

It does not appear to me to be important, in this connection, that that clause in the ordinance which prohibited slavery was one of a series of articles of what is therein termed a compact. The Congress of the Confederation had no power to make such a compact, nor to act at all on the subject; and after what had been so recently said by Mr. Madison on this subject, in the thirty-eighth number of the "Federalist," I cannot suppose that he, or any others who voted for this bill, attributed any intrinsic effect to what

was denominated in the ordinance a compact between "the original States and the people and States in the new territory;" there being no new States then in existence in the territory, with whom a compact could be made, and the few scattered inhabitants, unorganized into a political body, not being capable of becoming a party to a treaty, even if the Congress of the Confederation had had power to make one touching the government of that territory.

I consider the passage of this law to have been an assertion by the first Congress of the power of the United States to prohibit slavery within this part of the territory of the United States; for it clearly shows that slavery was thereafter to be prohibited there; and it could be prohibited only by an exertion of the power of the United States, under the Constitution; no other power being capable of operating within that territory after the Constitution took effect.

On the 2d of April, 1790 (1 Stat. at Large, 106), the first Congress passed an act accepting a deed of cession, by North Carolina, of that Territory afterwards erected into the State of Tennessee. The fourth express condition contained in this deed of cession, after providing that the inhabitants of the Territory shall be temporarily governed in the same manner as those beyond the Ohio, is followed by these words: "Provided, always, that no regulations made or to be made by Congress shall tend to emancipate slaves."

This provision shows that it was then understood Congress might make a regulation prohibiting slavery, and that Congress might also allow it to continue to exist in the Territory; and accordingly when, a few days later, Congress passed the act of May 20, 1790 (1 Stat. at Large, 123), for the government of the territory south of the river Ohio, it provided, "And the government of the territory south of the Ohio shall be similar to that now exercised in the territory north-west of the Ohio, except so far as is otherwise provided in the conditions expressed in an act of Congress of

the present session, entitled ‘an Act to accept a cession of the claims of the State of North Carolina to a certain district of western territory.’” Under the government thus established, slavery existed until the Territory became the State of Tennessee.

On the 7th of April, 1798 (1 Stat. at Large, 649), an act was passed to establish a government in the Mississippi Territory in all respects like that exercised in the territory north-west of the Ohio, “excepting and excluding the last article of the ordinance made for the government thereof by the late Congress, on the thirteenth day of July, 1787.” When the limits of this Territory had been amicably settled with Georgia, and the latter ceded all its claim thereto, it was one stipulation in the compact of cession that the ordinance of July 13, 1787, “shall in all its parts extend to the Territory contained in the present act of cession, that article only excepted which forbids slavery.” The government of this Territory was subsequently established and organized under the act of May 10, 1800; but so much of the ordinance as prohibited slavery was not put in operation there.

Without going minutely into the details of each case, I will now give reference to two classes of acts, in one of which Congress has extended the ordinance of 1787, including the article prohibiting slavery over different Territories, and thus exerted its power to prohibit it; in the other, Congress has erected governments over Territories acquired from France and Spain, in which slavery already existed, but refused to apply to them that part of the government under the ordinance which excluded slavery.

Of the first class are the act of May 7, 1800 (2 Stat. at Large, 58), for the government of the Indiana Territory; the act of Jan. 11, 1805 (2 Stat. at Large, 309), for the government of Michigan Territory; the act of May 3, 1809 (2 Stat. at Large, 514), for the government of the Illinois Territory; the act of April 20, 1836 (5 Stat. at Large, 10),

for the government of the Territory of Wisconsin ; the act of June 12, 1838, for the government of the Territory of Iowa ; the act of Aug. 14, 1848, for the government of the Territory of Oregon. To these instances should be added the act of March 6, 1820 (3 Stat. at Large, 548), prohibiting slavery in the Territory acquired from France, being north-west of Missouri, and north of thirty-six degrees thirty minutes north latitude.

Of the second class, in which Congress refused to interfere with slavery already existing under the municipal law of France or Spain, and established governments by which slavery was recognized and allowed, are : the act of March 26, 1804 (2 Stat. at Large, 283), for the government of Louisiana ; the act of March 2, 1805 (2 Stat. at Large, 322), for the government of the Territory of Orleans ; the act of June 4, 1812 (2 Stat. at Large, 743), for the government of the Missouri Territory ; the act of March 30, 1822 (3 Stat. at Large, 654), for the government of the Territory of Florida. Here are eight distinct instances, beginning with the first Congress, and coming down to the year 1848, in which Congress has excluded slavery from the territory of the United States ; and six distinct instances in which Congress organized governments of Territories by which slavery was recognized and continued, beginning also with the first Congress, and coming down to the year 1822. These acts were severally signed by seven Presidents of the United States, beginning with General Washington, and coming regularly down as far as Mr. John Quincy Adams, thus including all who were in public life when the Constitution was adopted.

If the practical construction of the Constitution contemporaneously with its going into effect, by men intimately acquainted with its history from their personal participation in framing and adopting it, and continued by them through a long series of acts of the gravest importance, be entitled to weight in the judicial mind on a question of

construction, it would seem to be difficult to resist the force of the acts above adverted to.

It appears, however, from what has taken place at the bar, that notwithstanding the language of the Constitution, and the long line of legislative and executive precedents under it, three different and opposite views are taken of the power of Congress respecting slavery in the Territories.

One is that, though Congress can make a regulation prohibiting slavery in a Territory, they cannot make a regulation allowing it; another is that it can neither be established nor prohibited by Congress, but that the people of a Territory, when organized by Congress, can establish or prohibit slavery; while the third is that the Constitution itself secures to every citizen who holds slaves, under the laws of any State, the indefeasible right to carry them into any Territory, and there hold them as property.

No particular clause of the Constitution has been referred to at the bar in support of either of these views. The first seems to be rested upon general considerations concerning the social and moral evils of slavery, its relations to republican governments, its inconsistency with the Declaration of Independence and with natural right.

The second is drawn from considerations equally general, concerning the right of self-government and the nature of the political institutions which have been established by the people of the United States.

While the third is said to rest upon the equal right of all citizens to go with their property upon the public domain, and the inequality of a regulation which would admit the property of some and exclude the property of other citizens, and inasmuch as slaves are chiefly held by citizens of those particular States where slavery is established, it is insisted that a regulation excluding slavery from a Territory operates practically to make an unjust discrimination between citizens of different States in respect to their use and enjoyment of the territory of the United States.

With the weight of either of these considerations, when presented to Congress to influence its action, this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation. The question here is, whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. To engraft on any instrument a substantive exception not found in it must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible; because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution: we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican government, with limited and defined powers, we have a government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

If it can be shown, by any thing in the Constitution itself, that, when it confers on Congress the power to make *all*

needful rules and regulations respecting the territory belonging to the United States, the exclusion or the allowance of slavery was excepted; or, if any thing in the history of this provision tends to show that such an exception was intended by those who framed and adopted the Constitution to be introduced into it, I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution. But where the Constitution has said *all* needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all.

There have been eminent instances in this court, closely analogous to this one, in which such an attempt to introduce an exception, not found in the Constitution itself, has failed of success.

By the eighth section of the first article, Congress has the power of exclusive legislation in all cases whatsoever within this district.

In the case of *Loughborough v. Blake*, 5 Wheat. 324, the question arose whether Congress has power to impose direct taxes on persons and property in this district. It was insisted that, though the grant of power was in its terms broad enough to include direct taxation, it must be limited by the principle that taxation and representation are inseparable. It would not be easy to fix on any political truth better established or more fully admitted in our country, than that taxation and representation must exist together. We went into the war of the Revolution to assert it, and it is incorporated as fundamental into all American governments. But, however true and important this maxim may be, it is not necessarily of universal application. It was for the people of the United States, who ordained the Constitution, to decide whether it should or should not be permitted to operate within this district. Their decision was embodied in the words of the Constitution; and, as that contained no such exception as would permit the maxim to operate in this

district, this court, interpreting that language, held that the exception did not exist.

Again, the Constitution confers on Congress power to regulate commerce with foreign nations. Under this, Congress passed an act on the 22d of December, 1807, unlimited in duration, laying an embargo on all ships and vessels in the ports or within the limits and jurisdiction of the United States. No law of the United States ever pressed so severely upon particular States. Though the constitutionality of the law was contested with an earnestness and zeal proportioned to the ruinous effects which were felt from it, and though, as Mr. Chief Justice Marshall has said (9 Wheat. 192), "A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this," I am not aware that the fact that it prohibited the use of a particular species of property, belonging almost exclusively to citizens of a few States, and this indefinitely, was ever supposed to show that it was unconstitutional. Something much more stringent, as a ground of legal judgment, was relied on,—that the power to regulate commerce did not include the power to annihilate commerce.

But the decision was that, under the power to regulate commerce, the power of Congress over the subject was restricted only by those exceptions and limitations contained in the Constitution; and as neither the clause in question, which was a general grant of power to regulate commerce, nor any other clause of the Constitution, imposed any restrictions as to the duration of an embargo, an unlimited prohibition of the use of the shipping of the country was within the power of Congress. On this subject, Mr. Justice Daniel, speaking for the court in the case of *United States v. Marigold*, 9 How. 560, says: "Congress are, by the Constitution, vested with the power to regulate commerce with foreign nations; and however, at periods of high excitement, an application of the terms 'to regulate commerce,'

such as would embrace absolute prohibition, may have been questioned, yet, since the passage of the embargo and non-intercourse laws, and the repeated judicial sanctions these statutes have received, it can scarcely at this day be open to doubt that every subject falling legitimately within the sphere of commercial regulation may be partially or wholly excluded, when either measure shall be demanded by the safety or the important interests of the entire nation. The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply it."

If power to regulate commerce extends to an indefinite prohibition of the use of all vessels belonging to citizens of the several States, and may operate without exception upon every subject of commerce to which the legislative discretion may apply it, upon what grounds can I say that power to make all needful rules and regulations respecting the territory of the United States is subject to an exception of the allowance or prohibition of slavery therein?

While the regulation is one "respecting the territory;" while it is, in the judgment of Congress, "a needful regulation," and is thus completely within the words of the grant; while no other clause of the Constitution can be shown, which requires the insertion of an exception respecting slavery; and while the practical construction for a period of upwards of fifty years forbids such an exception,—it would, in my opinion, violate every sound rule of interpretation to force that exception into the Constitution upon the strength of abstract political reasoning, which we are bound to believe the people of the United States thought insufficient to induce them to limit the power of Congress, because what they have said contains no such limitation.

Before I proceed further to notice some other grounds of supposed objection to this power of Congress, I desire to say that, if it were not for my anxiety to insist upon what I deem a correct exposition of the Constitution, if I looked

only to the purposes of the argument, the source of the power of Congress asserted in the opinion of the majority of the court would answer those purposes equally well. For they admit that Congress has power to organize and govern the Territories until they arrive at a suitable condition for admission to the Union ; they admit, also, that the kind of government which shall thus exist should be regulated by the condition and wants of each Territory, and that it is necessarily committed to the discretion of Congress to enact such laws for that purpose as that discretion may dictate ; and no limit to that discretion has been shown, or even suggested, save those positive prohibitions to legislate which are found in the Constitution.

I confess myself unable to perceive any difference whatever between my own opinion of the general extent of the power of Congress and the opinion of the majority of the court, save that I consider it derivable from the express language of the Constitution, while they hold it to be silently implied from the power to acquire territory. Looking at the power of Congress over the Territories as of the extent just described, what positive prohibition exists in the Constitution which restrained Congress from enacting a law in 1820 to prohibit slavery north of thirty-six degrees thirty minutes north latitude ?

The only one suggested is that clause in the fifth article of the amendments of the Constitution which declares that no person shall be deprived of his life, liberty, or property, without due process of law. I will now proceed to examine the question whether this clause is entitled to the effect thus attributed to it. It is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question.

Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution, and has been explicitly declared by this

court. The Constitution refers to slaves as "persons held to service in one State under the laws thereof." Nothing can more clearly describe a *status* created by municipal law. In *Prigg v. Pennsylvania*, 10 Peters, 611, this court said: "The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." In *Rankin v. Lydia*, 2 Marsh. 12, 470, the Supreme Court of Appeals of Kentucky said: "Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law." I am not acquainted with any case or writer questioning the correctness of this doctrine. See also 1 Burge, Col. & For. Laws, 738-741, where the authorities are collected.

The *status* of slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the State, whose will controls his action towards his slave, and this control must be defined and regulated by the municipal law. In one State, as at one period of the Roman law, it may put the life of the slave into the hand of the master; others, as those of the United States, which tolerate slavery, may treat the slave as a person when the master takes his life; while, in others, the law may recognize a right of the slave to be protected from cruel treatment. In other words, the *status* of slavery embraces every condition, from that in which the slave is known to the law simply as a chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor. Which of these conditions shall attend the *status* of slavery must depend on the municipal law which creates and upholds it.

And not only must the *status* of slavery be created and measured by municipal law, but the rights, powers, and

obligations which grow out of that *status* must be defined, protected, and enforced by such laws. The liability of the master for the torts and crimes of his slave, and of third persons for assaulting or injuring or harboring or kidnapping him, the forms and modes of emancipation and sale, their subjection to the debts of the master, succession by death of the master, suits for freedom, the capacity of the slave to be party to a suit or to be a witness, with such police regulations as have existed in all civilized States where slavery has been tolerated, are among the subjects upon which municipal legislation becomes necessary when slavery is introduced.

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery?

Is it not more rational to conclude that they who framed and adopted the Constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist; and that, being aware of these principles, and having said nothing to interfere with or displace them, or to compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein? Moreover, if the right exists, what are its limits, and what are its conditions? If citizens of the United States have the right to take their slaves to a Territory, and hold them there as slaves, without regard to

the laws of the Territory, I suppose this right is not to be restricted to the citizens of slaveholding States. A citizen of a State which does not tolerate slavery can hardly be denied the power of doing the same thing. And what law of slavery does either take with him to the Territory? If it be said to be those laws respecting slavery which existed in the particular State from which each slave last came, what an anomaly is this! Where else can we find, under the law of any civilized country, the power to introduce and permanently continue diverse systems of foreign municipal law for holding persons in slavery? I say, not merely to introduce, but permanently to continue, these anomalies. For the offspring of the female must be governed by the foreign municipal laws to which the mother was subject; and when any slave is sold, or passes by succession on the death of the owner, there must pass with him, by a species of subrogation, and as a kind of unknown *jus in re*, the foreign municipal laws which constituted, regulated, and preserved the *status* of the slave before his exportation. Whatever theoretical importance may be now supposed to belong to the maintenance of such a right, I feel a perfect conviction that it would, if ever tried, prove to be as impracticable in fact as it is, in my judgment, monstrous in theory.

I consider the assumption which lies at the basis of this theory to be unsound; not in its just sense, and when properly understood, but in the sense which has been attached to it. That assumption is that the territory ceded by France was acquired for the equal benefit of all the citizens of the United States. I agree to the position. But it was acquired for their benefit in their collective, not their individual capacities. It was acquired for their benefit as an organized political society, subsisting as "the people of the United States," under the Constitution of the United States; to be administered justly and impartially, and as nearly as possible for the equal benefit of every individual citizen, according to the best judgment and discretion of the Congress;

to whose power, as the legislature of the nation which acquired it, the people of the United States have committed its administration. Whatever individual claims may be founded on local circumstances or sectional differences of condition cannot, in my opinion, be recognized in this court without arrogating to the judicial branch of the Government powers not committed to it; and which, with all the unaffected respect I feel for it when acting in its proper sphere, I do not think it fitted to wield.

Nor, in my judgment, will the position that a prohibition to bring slaves into a Territory deprives any one of his property without due process of law bear examination.

It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States; it was borrowed from Magna Charta; was brought to America by our ancestors as part of their inherited liberties, and has existed in all the States, usually in the very words of the great charter. It existed in every political community in America in 1787, when the ordinance prohibiting slavery north and west of the Ohio was passed.

And, if a prohibition of slavery in a Territory in 1820 violated this principle of Magna Charta, the ordinance of 1787 also violated it; and what power had, I do not say the Congress of the Confederation alone, but the legislature of Virginia, or the legislature of any or all the States of the Confederacy, to consent to such a violation? The people of the States had conferred no such power. I think I may at least say, if the Congress did then violate Magna Charta by the ordinance, no one discovered that violation. Besides, if the prohibition upon all persons—citizens as well as others—to bring slaves into a Territory, and a declaration that, if brought, they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding States which have enacted the same prohibition? As early as October, 1778, a law was passed in Virginia, that thereafter no slave

should be imported into that Commonwealth by sea or by land, and that every slave who should be imported should become free. A citizen of Virginia purchased in Maryland a slave who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom and recovered it, as may be seen in *Wilson v. Isabel*, 5 Call, 425. See also *Hunter v. Hulsher*, 1 Leigh, 172; and a similar law has been recognized as valid in Maryland, in *Stewart v. Oaks*, 5 Har. & J. 107. I am not aware that such laws, though they exist in many States, were ever supposed to be in conflict with the principle of Magna Charta incorporated into the State Constitutions. It was certainly understood by the Convention which framed the Constitution, and has been so understood ever since, that under the power to regulate commerce Congress could prohibit the importation of slaves; and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can a similar regulation respecting a Territory violate the fifth amendment of the Constitution?

Some reliance was placed by the defendant's counsel upon the fact that the prohibition of slavery in this Territory was in the words, "that slavery, &c., shall be and is hereby for ever prohibited." But the insertion of the words *for ever* can have no legal effect. Every enactment not expressly limited in its duration continues in force until repealed or abrogated by some competent power, and the use of the words "for ever" can give to the law no more durable operation. The argument is that Congress cannot so legislate as to bind the future States formed out of the Territory, and that in this instance it has attempted to do so. Of the political reasons which may have induced the Congress to

use these words, and which caused them to expect that subsequent legislatures would conform their action to the then general opinion of the country that it ought to be permanent, this court can take no cognizance.

However fit such considerations are to control the action of Congress, and however reluctant a statesman may be to disturb what has been settled, every law made by Congress may be repealed; and saving private rights, and public rights gained by States, its repeal is subject to the absolute will of the same power which enacted it. If Congress had enacted that the crime of murder committed in this Indian Territory, north of thirty-six degrees thirty minutes, by or on any white man, should for ever be punishable with death, it would seem to me an insufficient objection to an indictment found while it was a Territory, that at some future day States might exist there, and so the law was invalid, because by its terms it was to continue in force for ever. Such an objection rests upon a misapprehension of the province and power of courts respecting the constitutionality of laws enacted by the legislature.

If the Constitution prescribe one rule and the law another and different rule, it is the duty of courts to declare that the Constitution, and not the law, governs the case before them for judgment. If the law include no case save those for which the Constitution has furnished a different rule, or no case which the legislature has the power to govern, then the law can have no operation. If it includes cases which the legislature has power to govern, and concerning which the Constitution does not prescribe a different rule, the law governs those cases, though it may in its terms attempt to include others on which it cannot operate. In other words, this court cannot declare void an act of Congress which constitutionally embraces some cases, though other cases, within its terms, are beyond the control of Congress, or beyond the reach of that particular law. If, therefore, Congress had power to make a law excluding slavery from this Territory,

while under the exclusive power of the United States, the use of the words "for ever" does not invalidate the law, so long as Congress has the exclusive legislative power in the Territory.

But it is further insisted that the treaty of 1803, between the United States and France, by which this Territory was acquired, has so restrained the constitutional powers of Congress that it cannot by law prohibit the introduction of slavery into that part of this Territory north and west of Missouri, and north of thirty-six degrees thirty minutes north latitude.

By a treaty with a foreign nation, the United States may rightfully stipulate that the Congress will or will not exercise its legislative power in some particular manner, on some particular subject. Such promises, when made, should be voluntarily kept with the most scrupulous good faith. But that a treaty with a foreign nation can deprive the Congress of any part of the legislative power conferred by the people, so that it no longer can legislate as it was empowered by the Constitution to do, I more than doubt.

The powers of the Government do and must remain unimpaired. The responsibility of the Government to a foreign nation for the exercise of those powers is quite another matter. That responsibility is to be met and justified to the foreign nation, according to the requirements of the rules of public law; but never upon the assumption that the United States had parted with or restricted any power of acting according to its own free will, governed solely by its own appreciation of its duty.

The second section of the fourth article is, "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." This has made treaties part of our municipal law; but it has not assigned to them any particular degree of authority, nor declared

that laws so enacted shall be irrepealable. No supremacy is assigned to treaties over acts of Congress. That they are not perpetual, and must be in some way repealable, all will agree.

If the President and the Senate alone possess the power to repeal or modify a law found in a treaty, inasmuch as they can change or abrogate one treaty only by making another inconsistent with the first, the Government of the United States could not act at all to that effect, without the consent of some foreign government. I do not consider — I am not aware it has ever been considered — that the Constitution has placed our country in this helpless condition. The action of Congress in repealing the treaties with France by the act of July 7, 1798 (1 Stat. at Large, 578), was in conformity with these views. In the case of *Taylor et al. v. Morton*, 2 Curtis's C. C. 454, I had occasion to consider this subject, and I adhere to the views there expressed.

If, therefore, it were admitted that the treaty between the United States and France did contain an express stipulation that the United States would not exclude slavery from so much of the ceded territory as is now in question, this court could not declare that an act of Congress excluding it was void by force of the treaty. Whether or not a case existed sufficient to justify a refusal to execute such a stipulation, would not be a judicial, but a political and legislative question, wholly beyond the authority of this court to try and determine. It would belong to diplomacy and legislation, and not to the administration of existing laws. Such a stipulation in a treaty to legislate or not to legislate in a particular way has been repeatedly held in this court to address itself to the political or the legislative power, by whose action thereon this court is bound. *Foster v. Nicolson*, 2 Peters, 314; *Garcia v. Lee*, 12 Peters, 519.

But, in my judgment, this treaty contains no stipulation in any manner affecting the action of the United States

respecting the Territory in question. Before examining the language of the treaty, it is material to bear in mind that the part of the ceded Territory lying north of thirty-six degrees thirty minutes, and west and north of the present State of Missouri, was then a wilderness, uninhabited save by savages whose possessory title had not then been extinguished.

It is impossible for me to conceive on what ground France could have advanced a claim, or could have desired to advance a claim, to restrain the United States from making any rules and regulations respecting this Territory, which the United States might think fit to make; and still less can I conceive of any reason which would have induced the United States to yield to such a claim. It was to be expected that France would desire to make the change of sovereignty and jurisdiction as little burdensome as possible to the then inhabitants of Louisiana, and might well exhibit even an anxious solicitude to protect their property and persons, and secure to them and their posterity their religious and political rights; and the United States, as a just Government, might readily accede to all proper stipulations respecting those who were about to have their allegiance transferred. But what interest France could have in uninhabited territory which, in the language of the treaty, was to be transferred "for ever, and in full sovereignty," to the United States, or how the United States could consent to allow a foreign nation to interfere in its purely internal affairs, in which that foreign nation had no concern whatever, is difficult for me to conjecture. In my judgment, this treaty contains nothing of the kind.

The third article is supposed to have a bearing on the question. It is as follows: "The inhabitants of the ceded Territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the

United States; and in the mean time they shall be maintained and protected in the enjoyment of their liberty, property, and the religion they profess."

There are two views of this article, each of which, I think, decisively shows that it was not intended to restrain the Congress from excluding slavery from that part of the ceded Territory then uninhabited. The first is that, manifestly, its sole object was to protect individual rights of the then inhabitants of the Territory. They are to be "maintained and protected in the free enjoyment of their liberty, property, and the religion they profess." But this article does not secure to them the right to go upon the public domain ceded by the treaty, either with or without their slaves. The right or power of doing this did not exist before or at the time the treaty was made. The French and Spanish governments while they held the country, as well as the United States when they acquired it, always exercised the undoubted right of excluding inhabitants from the Indian country, and of determining when and on what conditions it should be opened to settlers. And a stipulation that the then inhabitants of Louisiana should be protected in their property can have no reference to their use of that property where they had no right, under the treaty, to go with it, save at the will of the United States. If one who was an inhabitant of Louisiana at the time of the treaty had afterwards taken property then owned by him, consisting of fire-arms, ammunition, and spirits, and had gone into the Indian country north of thirty-six degrees thirty minutes, to sell them to the Indians, all must agree the third article of the treaty would not have protected him from indictment under the act of Congress of March 30, 1802 (2 Stat. at Large, 139), adopted and extended to this Territory by the act of March 26, 1804 (2 Stat. at Large, 283).

Besides, whatever rights were secured were individual rights. If Congress should pass any law which violated

such rights of any individual, and those rights were of such a character as not to be within the lawful control of Congress under the Constitution, that individual could complain, and the act of Congress, as to such rights of his, would be inoperative; but it would be valid and operative as to all other persons whose individual rights did not come under the protection of the treaty. And inasmuch as it does not appear that any inhabitant of Louisiana, whose rights were secured by treaty, had been injured, it would be wholly inadmissible for this court to assume: first, that one or more such cases may have existed; and, second, that, if any did exist, the entire law was void,—not only as to those cases, if any, in which it could not rightfully operate, but as to all others, wholly unconnected with the treaty, in which such law could rightfully operate.

But it is quite unnecessary, in my opinion, to pursue this inquiry further, because it clearly appears from the language of the article, and it has been decided by this court, that the stipulation was temporary, and ceased to have any effect when the then inhabitants of the Territory of Louisiana, in whose behalf the stipulation was made, were incorporated into the Union.

In the cases of *New Orleans v. De Armas et al.*, 9 Peters, 223, the question was, whether a title to property, which existed at the date of the treaty, continued to be protected by the treaty after the State of Louisiana was admitted to the Union. The third article of the treaty was relied on. Mr. Chief Justice Marshall said: "This article obviously contemplates two objects. One, that Louisiana shall be admitted into the Union as soon as possible, on an equal footing with the other States; and the other, that, till such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property, and religion. Had any one of these rights been violated while these stipulations continued in force, the individual supposing himself to be injured might have brought his case

into this court, under the twenty-fifth section of the judicial act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were "admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States."

The cases of *Chouteau v. Marguerita*, 12 Peters, 507, and *Permoli v. New Orleans*, 3 How. 589, are in conformity with this view of the treaty.

To convert this temporary stipulation of the treaty, in behalf of French subjects who then inhabited a small portion of Louisiana, into a permanent restriction upon the power of Congress to regulate territory then uninhabited, and to assert that it not only restrains Congress from affecting the rights of property of the then inhabitants, but enabled them and all other citizens of the United States to go into any part of the ceded Territory with their slaves, and hold them there, is a construction of this treaty so opposed to its natural meaning, and so far beyond its subject-matter and the evident design of the parties, that I cannot assent to it. In my opinion, this treaty has no bearing on the present question.

For these reasons, I am of opinion that so much of the several acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude, and west of the river Mississippi, were constitutional and valid laws.

I have expressed my opinion, and the reasons therefor, at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass, to arrive at a judgment on the case at bar. These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. I have touched no question which, in the view I have taken, it was not absolutely necessary for me to pass upon, to ascertain whether the judgment of the Circuit Court should stand

or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less would have been inconsistent with my views of my duty.

In my opinion, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.

## EXECUTIVE POWER.

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The circumstances under which this pamphlet was written and published are fully explained, *ante*, vol. i. p. 350, *et seq.* It first appeared in October, 1862.

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### DEDICATION.

TO ALL PERSONS WHO HAVE SWORN TO SUPPORT  
THE CONSTITUTION OF THE UNITED STATES,  
AND  
TO ALL CITIZENS WHO VALUE THE PRINCIPLES OF CIVIL LIBERTY WHICH  
THAT CONSTITUTION EMBODIES, AND FOR THE PRESERVATION  
OF WHICH IT IS OUR ONLY SECURITY,  
*These Pages*  
ARE RESPECTFULLY DEDICATED  
BY THE AUTHOR

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### PREFACE.

EXTRACT FROM PRESIDENT LINCOLN'S PROCLAMATION OF SEPTEMBER 22, 1862.

“ THAT, on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State, or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and for ever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to suppress such persons, or any of them, in any efforts they may make for their actual freedom.

“ That the Executive will, on the first day of January aforesaid, by proclamation, designate the States, and parts of States, if any, in which

the people thereof respectively shall then be in rebellion against the United States; and the fact that any State, or the people thereof, shall on that day be in good faith represented in the Congress of the United States, by members chosen thereto at elections wherein a majority of the qualified voters of such State shall have participated, shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such State, and the people thereof, are not then in rebellion against the United States."

"Understand, I raise no objection against it on legal or constitutional grounds; for, *as commander-in-chief of the army and navy, in time of war, I suppose I have a right to take any measure which may best subdue the enemy.*" — PRESIDENT LINCOLN TO THE CHICAGO DELEGATION.

#### PROCLAMATION OF SEPTEMBER 24, 1862.

"Whereas, it has become necessary to call into service not only volunteers, but also portions of the militia of the States by draft, in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary processes of law from hindering this measure, and from giving aid and comfort in various ways to the insurrection:

"Now, therefore, be it ordered, —

"First. That, during the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to the rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts-martial or military commission.

"Second. That the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court-martial or military commission.

"In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

"Done at the city of Washington, this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh. ABRAHAM LINCOLN.

"By the President:

"WILLIAM H. SEWARD, *Secretary of State.*"

ORDERS OF THE SECRETARY OF WAR PROMULGATED SEPTEMBER  
26, 1862.

First. There shall be a provost-marshall-general of the war department, whose head-quarters will be at Washington, and who will have the immediate supervision, control, and management of the corps.

Second. There will be appointed in each State one or more special provost-marshals, as necessity may require, who will report and receive instructions and orders from the provost-marshall-general of the war department.

Third. It will be the duty of the special provost-marshall to arrest all deserters, whether regulars, volunteers, or militia, and send them to the nearest military commander or military post, where they can be cared for and sent to their respective regiments; to arrest, upon the warrant of the judge-advocate, all disloyal persons subject to arrest under the orders of the war department; to inquire into and report treasonable practices, seize stolen or embezzled property of the government, detect spies of the enemy, and perform such other duties as may be enjoined upon them by the war department, and report all their proceedings promptly to the provost-marshall-general.

Fourth. To enable special provost-marshals to discharge their duties efficiently, they are authorized to call on any available military force within their respective districts, or else to employ the assistance of citizens, constables, sheriffs, or police-officers, so far as may be necessary under such regulations as may be prescribed by the provost-marshall-general of the war department, with the approval of the Secretary of War.

Fifth. Necessary expenses incurred in this service will be paid on duplicate bills certified by the special provost-marshals, stating time and nature of service, after examination and approval by the provost-marshall-general.

Sixth. The compensation of special provost-marshals will be — dollars per month, and actual travelling expenses, and postage will be refunded on bills certified under oath and approved by the provost-marshall-general.

Seventh. All appointments in this service will be subject to be revoked at the pleasure of the Secretary of War.

Eighth. All orders heretofore issued by the war department, conferring authority upon other officers to act as provost-marshals, except those who received special commissions from the war department, are hereby revoked.

By order of the Secretary of War.

L. THOMAS, *Adjutant-General.*

## EXECUTIVE POWER.

No citizen can be insensible to the vast importance of the late proclamations and orders of the President of the United States. Great differences of opinion already exist concerning them. But, whatever those differences of opinion may be, upon one point all must agree. They are assertions of transcendent executive power.

There is nothing in the character or conduct of the chief magistrate, there is nothing in his present position in connection with these proclamations, and there is nothing in the state of the country, which should prevent a candid and dispassionate discussion either of their practical tendencies, or of the source of power from whence they are supposed to spring.

The President on all occasions has manifested the strongest desire to act cautiously, wisely, and for the best interests of the country. What is commonly called his proclamation of emancipation is, from its terms and from the nature of the case, only a declaration of what, at its date, he believed might prove expedient, within yet undefined territorial limits, three months hence, thirty days after the next meeting of Congress, and within territory not at present subject even to our military control. Of course such an executive declaration as to his future intentions must be understood by the people to be liable to be modified by events, as well as subject to such changes of views, respecting the extent of his own powers, as a more mature and possibly a more enlightened consideration may produce.

In April, 1861, the President issued his proclamation, declaring that he would treat as pirates all persons who should cruise, under the authority of the so-called Confederate States, against the commerce of the United States.

But subsequent events induced him, with general acquiescence, to exchange them as prisoners of war,—not from any fickleness of purpose, but because the interests of the

country imperatively demanded this departure from his proposed course of action.

In like manner, it is not to be doubted by any one who esteems the President honestly desirous to do his duty to the country, under the best lights possible, that when the time for his action on his recent proclamations and orders shall arrive it will be in conformity with his own wishes that he should have those lights which are best elicited in this country by temperate and well-considered public discussion,—discussion, not only of the practical consequences of the proposed measures, but of his own constitutional power to decree and execute them.

The Constitution has made it incumbent on the President to recommend to Congress such measures as he shall deem necessary and expedient. Although Congress will have been in session nearly thirty days before any executive action is proposed to be taken on this subject of emancipation, it can hardly be supposed that this proclamation was intended to be a recommendation to them. Still, in what the President may perhaps regard as having some flavor of the spirit of the Constitution, he makes known to the people of the United States his proposed future executive action; certainly not expecting or desiring that they should be indifferent to such a momentous proposal, or should fail to exercise their best judgments and afford their best counsels upon what so deeply concerns themselves.

Our public affairs are in a condition to render unanimity, not only in the public councils of the nation, but among the people themselves, of the first importance. But the President must have been aware, when he issued these proclamations, that nothing approaching towards unanimity upon their subjects could be attained among the people, save through their public discussion. And, as his desire to act in accordance with the wisest and best settled and most energetic popular sentiment cannot be doubted, we may justly believe that executive action has been postponed,

among other reasons, for the very purpose of allowing time for such discussion.

And in reference to the last proclamation, and the orders of the Secretary of War intended to carry it into practical effect, though their operation is immediate, so far as their express declarations can make them so, they have not yet been practically applied to such an extent or in such a way as not to allow it to be supposed that the grounds upon which they rest are open for examination.

However this may be, these are subjects in which the people have vast concern. It is their right, it is their duty, to themselves and to their posterity, to examine and to consider and to decide upon them; and no citizen is faithful to his great trust, if he fail to do so according to the best lights he has or can obtain. And if, finally, such examination and consideration shall end in diversity of opinion, it must be accepted as justly attributable to the questions themselves, or to the men who have made them.

It has been attempted by some partisan journals to raise the cry of "disloyalty" against any one who should question these executive acts.

But the people of the United States know that loyalty is not subserviency to a man or to a party, or to the opinions of newspapers; but that it is an honest and wise devotion to the safety and welfare of our country, and to the great principles which our Constitution of government embodies, by which alone that safety and welfare can be secured. And, when those principles are put in jeopardy, every truly loyal man must interpose according to his ability, or be an unfaithful citizen.

This is not a government of men. It is a government of laws. And the laws are required by the people to be in conformity with their will declared by the Constitution. Our loyalty is due to that will. Our obedience is due to those laws; and he who would induce submission to other laws springing from sources of power not originating in the

people, but in casual events, and in the mere will of the occupants of places of power, does not exhort us to loyalty, but to a desertion of our trust.

That they whose principles he questions have the conduct of public affairs; that the times are most critical; that public unanimity is highly necessary,—while these facts afford sufficient reasons to restrain all opposition upon any personal or party grounds, they can afford no good reason—hardly a plausible apology—for failure to oppose usurpation of power, which, if acquiesced in and established, must be fatal to a free government.

The war in which we are engaged is a just and necessary war. It must be prosecuted with the whole force of this government till the military power of the South is broken, and they submit themselves to their duty to obey, and our right to have obeyed, the Constitution of the United States as “the supreme law of the land.” But with what sense of right can we subdue them by arms to obey the Constitution as the supreme law of *their* part of the land, if we have ceased to obey it, or failed to preserve it, as the supreme law of *our* part of the land.

I am a member of no political party. Duties inconsistent, in my opinion, with the preservation of any attachments to a political party, caused me to withdraw from all such connections many years ago, and they have never been resumed. I have no occasion to listen to the exhortations, now so frequent, to divest myself of party ties and disregard party objects, and act for my country. I have nothing but my country for which to act in any public affair; and solely because I have that yet remaining, and know not but it may be possible, from my studies and reflections, to say something to my countrymen which may aid them to form right conclusions in these dark and dangerous times, I now reluctantly address them.

I do not propose to discuss the question whether the first of these proclamations of the President, if definitively

adopted, can have any practical effect on the unhappy race of persons to whom it refers ; nor what its practical consequences would be upon them and upon the white population of the United States, if it should take effect ; nor through what scenes of bloodshed, and worse than bloodshed, it may be, we should advance to those final conditions ; nor even the lawfulness, in any Christian or civilized sense, of the use of such means to attain *any* end.

If the entire social condition of nine millions of people has, in the providence of God, been allowed to depend upon the executive decree of one man, it will be the most stupendous fact which the history of the race has exhibited. But, for myself, I do not yet perceive that this vast responsibility is placed upon the President of the United States. I do not yet see that it depends upon his executive decree whether a servile war shall be invoked to help twenty millions of the white race to assert the rightful authority of the Constitution and laws of their country over those who refuse to obey them. But I do see that this proclamation asserts the power of the executive to make such a decree.

I do not yet perceive how it is that my neighbors and myself, residing remote from armies and their operations, and where all the laws of the land may be enforced by constitutional means, should be subjected to the possibility of military arrest and imprisonment, and trial before a military commission, and punishment at its discretion for offences unknown to the law ; a possibility to be converted into a fact at the mere will of the President, or of some subordinate officer, clothed by him with this power. But I do perceive that this executive power is asserted.

I am quite aware that, in times of great public danger, unexpected perils, which the legislative power have failed to provide against, may imperatively demand instant and vigorous executive action, passing beyond the limits of the laws ; and that, when the Executive has assumed the high responsibility of such a necessary exercise of mere power,

he may justly look for indemnity to that department of the government which alone has the rightful authority to grant it,—an indemnity which should be always sought and accorded upon the clearest admission of legal wrong, finding its excuse in the exceptional case which made that wrong absolutely necessary for the public safety.

But I find no resemblance between such exceptional cases and the substance of these proclamations and these orders. They do not relate to exceptional cases: they establish a system. They do not relate to some instant emergency: they cover an indefinite future. They do not seek for excuses: they assert powers and rights. They are general rules of action, applicable to the entire country and to every person in it, or to great tracts of country and to the social condition of their people; and they are to be applied whenever and wherever and to whomsoever the President, or any subordinate officer whom he may employ, may choose to apply them.

Certainly, these things are worthy of the most deliberate and searching examination.

Let us, then, analyze these proclamations and orders of the President: let us comprehend the nature and extent of the powers they assume. Above all, let us examine that portentous cloud of the military power of the President, which is supposed to have overcome us and the civil liberties of the country, pursuant to the will of the people, ordained in the Constitution because we are in a state of war.

And, first, let us understand the nature and operation of the proclamation of emancipation, as it is termed; then, let us see the character and scope of the other proclamation, and the orders of the Secretary of War, designed to give it practical effect; and, having done so, let us examine the asserted source of these powers.

The proclamation of emancipation, if taken to mean what in terms it asserts, is an executive decree that, on the first day of January next, all persons held as slaves,

within such States or parts of States as shall then be designated, shall cease to be lawfully held to service, and may by their own efforts, and with the aid of the military power of the United States, vindicate their lawful right to their personal freedom.

The persons who are the subjects of this proclamation are held to service by the laws of the respective States in which they reside, enacted by State authority as clear and unquestionable, under our system of government, as any law passed by any State on any subject.

This proclamation, then, by an executive decree, proposes to repeal and annul valid State laws which regulate the domestic relations of their people. Such is the mode of operation of the decree.

The next observable characteristic is that this executive decree holds out this proposed repeal of State laws as a threatened penalty for the continuance of a governing majority of the people of each State, or part of a State, in rebellion against the United States. So that the President hereby assumes to himself the power to denounce it as a punishment against the entire people of a State, that the valid laws of that State which regulate the domestic condition of its inhabitants shall become null and void, at a certain future date, by reason of the criminal conduct of a governing majority of its people.

This penalty, however, it should be observed, is not to be inflicted on those persons who have been guilty of treason. The freedom of their slaves was already provided for by the act of Congress, recited in a subsequent part of the proclamation. It is not, therefore, as a punishment of guilty persons that the commander-in-chief decrees the freedom of slaves. It is upon the slaves of loyal persons, or of those who, from their tender years, or other disability, cannot be either disloyal or otherwise, that the proclamation is to operate, if at all; and it is to operate to set them free, in spite of the valid laws of their States, because a majority

of the legal voters do not send representatives to Congress.

Now it is easy to understand how persons held to service under the laws of these States, and how the army and navy under the orders of the President, may overturn these valid laws of the States, just as it is easy to imagine that any law may be violated by physical force. But I do not understand it to be the purpose of the President to incite a part of the inhabitants of the United States to rise in insurrection against valid laws; but that, by virtue of some power which he possesses, he proposes to annul those laws, so that they are no longer to have any operation.

The second proclamation, and the orders of the Secretary of War, which follow it, place every citizen of the United States under the direct military command and control of the President. They declare and define new offences, not known to any law of the United States. They subject all citizens to be imprisoned upon a military order, at the pleasure of the President, when, where, and so long as he, or whoever is acting for him, may choose. They hold the citizen to trial before a military commission appointed by the President, or his representative, for such acts or omissions as the President may think proper to decree to be offences; and they subject him to such punishment as such military commission may be pleased to inflict. They create new offices, in such number, and whose occupants are to receive such compensation, as the President may direct; and the holders of these offices, scattered through the States, but with one chief inquisitor at Washington, are to inspect and report upon the loyalty of the citizens, with a view to the above-described proceedings against them, when deemed suitable by the central authority.

Such is a plain and accurate statement of the nature and extent of the powers asserted in these executive proclamations.

What is the source of these vast powers? Have they any limit? Are they derived from, or are they utterly inconsistent with, the Constitution of the United States?

The only supposed source or measure of these vast powers appears to have been designated by the President, in his reply to the address of the Chicago clergymen, in the following words: "Understand, I raise no objection against it on legal or constitutional grounds; for, as commander-in-chief of the army and navy, in time of war, I suppose I have a right to take any measure which may best subdue the enemy." This is a clear and frank declaration of the opinion of the President respecting the origin and extent of the power he supposes himself to possess; and, so far as I know, no source of these powers other than the authority of commander-in-chief in time of war, has ever been suggested.

There has been much discussion concerning the question whether the power to suspend the "privilege of the writ of habeas corpus" is conferred by the Constitution on Congress or on the President. The only judicial decisions which have been made upon this question have been adverse to the power of the President. Still, very able lawyers have endeavored to maintain -- perhaps to the satisfaction of others, have maintained -- that the power to deprive a particular person of "the privilege of the writ" is an executive power. For while it has been generally, and, so far as I know, universally admitted, that Congress alone can suspend a law, or render it inoperative, and consequently that Congress alone can prohibit the courts from issuing the writ, yet that the Executive might, in particular cases, suspend or deny the privilege which the writ was designed to secure, I am not aware that any one has attempted to show that, under this grant of power to suspend "the privilege of the writ of habeas corpus," the President may annul the laws of States, create new offences unknown to the laws of the United States, erect military

commissions to try and punish them, and then, by a sweeping decree, suspend the writ of habeas corpus as to all persons who shall be "arrested by any military authority." I think he would make a more bold than wise experiment on the credulity of the people, who should attempt to convince them that this power is found in the habeas corpus clause of the Constitution. No such attempt has been, and I think none such will be, made. And therefore I repeat that no other source of this power has ever been suggested, save that described by the President himself, as belonging to him as the commander-in-chief.

It must be obvious to the meanest capacity that, if the President of the United States has an implied constitutional right, as commander-in-chief of the army and navy in time of war, to disregard any one positive prohibition of the Constitution, or to exercise any one power not delegated to the United States by the Constitution, because, in his judgment, he may thereby "best subdue the enemy," he has the same right, for the same reason, to disregard each and every provision of the Constitution, and to exercise all power needful, in his opinion, to enable him "best to subdue the enemy."

It has never been doubted that the power to abolish slavery within the States was not delegated to the United States by the Constitution, but was reserved to the States. If the President, as commander-in-chief of the army and navy in time of war, may, by an executive decree, exercise this power to abolish slavery in the States, which power was reserved to the States, because he is of opinion that he may thus "best subdue the enemy," what other power, reserved to the States or to the people, may not be exercised by the President, for the same reason that he is of opinion he may thus best subdue the enemy? And, if so, what distinction can be made between powers not delegated to the United States at all, and powers which, though thus delegated, are conferred by the Constitution upon some department of the

Government other than the Executive? Indeed, the proclamation of Sept. 24, 1862, followed by the orders of the War Department, intended to carry it into practical effect, are manifest assumptions by the President of powers delegated to the Congress and to the judicial department of the Government. It is a clear and undoubted prerogative of Congress alone to define all offences, and to affix to each some appropriate and not cruel or unusual punishment. But this proclamation and these orders create new offences, not known to any law of the United States. "Discouraging enlistments," and "any disloyal practice," are not offences known to any law of the United States. At the same time, they may include, among many other things, acts which are offences against the laws of the United States, and, among others, treason. Under the Constitution and laws of the United States, except in cases arising in the land and naval forces, every person charged with an offence is expressly required to be proceeded against, and tried by the judiciary of the United States and a jury of his peers; and he is required by the Constitution to be punished, in conformity with some act of Congress applicable to the offence proved, enacted before its commission. But this proclamation and these orders remove the accused from the jurisdiction of the judiciary; they substitute a report, made by some deputy provost-marshall, for the presentment of a grand jury; they put a military commission in place of a judicial court and jury required by the Constitution; and they apply the discretion of the commission and the President, fixing the degree and kind of punishment, instead of the law of Congress fixing the penalty of the offence.

It no longer remains to be suggested that, if the ground of action announced by the President be tenable, he may, as commander-in-chief of the army and navy, use powers not delegated to the United States by the Constitution; or may use powers by the Constitution exclusively delegated to the legislative and the judicial departments of the Govern-

ment. These things have been already done, so far as the proclamations and orders of the President can effect them.

It is obvious that, if no private citizen is protected in his liberty by the safeguards thrown around him by the express provisions of the Constitution; but each and all of those safeguards may be disregarded, to subject him to military arrest upon the report of some deputy provost-marshal, and imprisonment at the pleasure of the President, and trial before a military commission, and punishment at its discretion, because the President is of opinion that such proceedings "may best subdue the enemy,"—then every member of either House of Congress and every judicial officer is liable to be proceeded against as a "disloyal person," by the same means and in the same way. So that, under this assumption concerning the implied powers of the President as commander-in-chief in time of war, if the President shall be of opinion that the arrest and incarceration, and trial before a military commission, of a judge of the United States, for some judicial decision, or of one or more members of either House of Congress for words spoken in debate, is "a measure which may best subdue the enemy," there is then conferred on him by the Constitution the rightful power so to proceed against such judicial or legislative officer.

This power is certainly not found in any express grant of power made by the Constitution to the President, nor even in any delegation of power made by the Constitution of the United States to any department of the Government. It is claimed to be found solely in the fact that he is the commander-in-chief of its army and navy, charged with the duty of subduing the enemy. And to this end, as he understands it, he is charged with the duty of using, not only those great and ample powers which the Constitution and laws, and the self-devotion of the people in executing them, have placed in his hands, but charged with the duty of using powers which the people have reserved to the States, or to themselves; and is permitted to break down those great constitutional safe-

guards of the partition of governmental powers, and the immunity of the citizen from mere executive control, which are at once both the end and the means of free government.

The necessary result of this interpretation of the Constitution is that, in time of war, the President has any and all power which he may deem it necessary to exercise, to subdue the enemy; and that every private and personal right of individual security against mere executive control, and every right reserved to the States or the people, rests merely upon executive discretion.

But the military power of the President is derived solely from the Constitution; and it is as sufficiently defined there as his purely civil power. These are its words: "The President shall be the Commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

This is his military power. He is the general-in-chief; and as such, in prosecuting war, may do what generals in the field are allowed to do within the sphere of their actual operations, in subordination to the laws of their country, from which alone they derive their authority.<sup>1</sup>

<sup>1</sup> The case of *Mitchel v. Harmony*, 13 How. 115, presented for the decision of the Supreme Court of the United States the question of the extent of the right of a commanding general in the field to appropriate private property to the public service; and it was decided that such an appropriation might be made, in case it should be rendered necessary by an immediate and pressing danger or urgent necessity existing at the time, and not admitting of delay, but not otherwise.

In delivering the opinion of the court, the Chief Justice said: "Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is whether the law permits it to be taken, to insure the success of any enterprise against a public enemy, which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it. The case mentioned by Lord Mansfield, in delivering his opinion in *Mostyn v. Fabrigas*, 1 Cowp. 180, illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the

When the Constitution says that the President shall be the commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States, does it mean that he shall possess military power and command over all citizens of the United States; that by military edicts he may control all citizens as if enlisted in the army or navy, or in the militia called into the actual service of the United States? Does it mean that he may make himself a legislator, and enact penal laws governing the citizens of the United States, and erect tribunals and create offices to enforce his penal edicts upon citizens? Does it mean that he may, by a prospective executive decree, repeal and annul the laws of the several States which respect subjects reserved by the Constitution for the exclusive action of the States and the people? The President is the commander-in-chief of the army and navy, not only by force of the Constitution, but under and subject to the Constitution, and to every restriction therein contained, and to every law enacted by its authority, as completely and clearly as the private in his ranks.

He is general-in-chief; but can a general-in-chief disobey any law of his own country? When he can, he superadds health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property and without the authority of law; and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed. This case shows how carefully the rights of property are guarded by the laws of England; and they are certainly not less valued, nor less securely guarded, under the Constitution and laws of the United States."

It may safely be said that neither of the very eminent counsel by whom that case was argued, and that no judge before whom it came, had then advanced to the conception that a commanding general may lawfully take any measure which may best subdue the enemy. The wagons, mules, and packages seized by General Donophon, in that case, were of essential service in his brilliant and successful attack on the lines of Chihuahua. But this did not save him from being liable to their owner as a mere wrong-doer, under the Constitution and laws of the United States.

to his rights as commander the powers of a usurper; and that is military despotism. In the noise of arms, have we become deaf to the warning voices of our fathers to take care that the military shall always be subservient to the civil power. Instead of listening to these voices, some persons now seem to think that it is enough to silence objection to say, True enough, there is no civil right to do this or that, but it is a military act. They seem to have forgotten that every military act is to be tested by the Constitution and laws of the country under whose authority it is done. And that, under the Constitution and laws of the United States, no more than under the government of Great Britain, or under any free or any settled government, the mere authority to command an army is not an authority to disobey the laws of the country.

The framers of the Constitution thought it wise that the powers of the commander-in-chief of the military forces of the United States should be placed in the hands of the chief civil magistrate. But the powers of commander-in-chief are in no degree enhanced or varied by being conferred upon the same officer who has important civil functions. If the Constitution had provided that a commander-in-chief should be appointed by Congress, his powers would have been the same as the military powers of the President now are. And what would be thought by the American people of an attempt by a general-in-chief to legislate by his decrees for the people and the States.

Besides, all the powers of the President are executive merely. He cannot make a law. He cannot repeal one. He can only execute the laws. He can neither make nor suspend nor alter them. He cannot even make an article of war. He may govern the army, either by general or special orders, but only in subordination to the Constitution and laws of the United States, and the articles of war enacted by the legislative power.

The time has certainly come when the people of the

United States *must* understand and *must* apply those great rules of civil liberty which have been arrived at by the self-devoted efforts of thought and action of their ancestors during seven hundred years of struggle against arbitrary power. If they fail to understand and apply them, if they fail to hold every branch of their government steadily to them, who can imagine what is to come out of this great and desperate struggle? The military power of eleven of these States being destroyed, what then? What is to be their condition? What is to be *our* condition?

Are the great principles of free government to be used and consumed as means of war? Are we not wise enough and strong enough to carry on this war to a successful military end, without submitting to the loss of any one great principle of liberty? We are strong enough. We are wise enough, if the people and their servants will but understand and observe the just limits of military power.

What, then, are those limits? They are these: there is military law; there is martial law. Military law is that system of laws enacted by the legislative power for the government of the army and navy of the United States, and of the militia when called into the actual service of the United States. It has no control whatever over any person or any property of any citizen. It could not even apply to the teamsters of an army, save by force of express provisions of the laws of Congress making such persons amenable thereto. The persons and the property of private citizens of the United States are as absolutely exempted from the control of military law as they are exempted from the control of the laws of Great Britain.

But there is also martial law. What is this?<sup>1</sup> It is the

<sup>1</sup> The following extracts from the opinion of Mr. Justice Woodbury, delivered in the Supreme Court of the United States in the case of *Luther v. Borden*, 7 How. 62, state what martial law is, and some of the incidents of its history:—

“By it every citizen, instead of reposing under the shield of known and fixed laws as to his liberty, property, and life, exists with a rope round his

will of a military commander operating without any restraint, save his judgment, upon the lives, upon the property, upon the entire social and individual condition of all over whom this law extends. But, under the Constitution of the United States, over whom does such law extend?

neck, subject to be hung up by a military despot at the next lamp-post, under the sentence of some drum-head court-martial. See Simmons's Practice of Courts-Martial, 40. See such a trial in Hough on Courts-Martial, 383, where the victim on the spot was 'blown away by a gun,' neither time, place, nor persons considered.' As an illustration how the passage of such a law may be abused, Queen Mary put it in force in 1558, by proclamation merely, and declared, 'That whosoever had in his possession any heretical, treasonable, or seditious books, and did not presently burn them, without reading them or showing them to any other person, should be esteemed a rebel, and without any further delay be executed by the martial law.' Tytler on Military Law, chap. i. § 1, p. 50.

"For convincing reasons like these, in every country which makes any claim to political or civil liberty, 'martial law' as here attempted, and as once practised in England against her own people, has been expressly forbidden there for near two centuries, as well as by the principles of every other free constitutional government. 1 Hallam's Const. Hist. 420. And it would be not a little extraordinary, if the spirit of our institutions, both State and national, was not much stronger than in England against the unlimited exercise of martial law over a whole people, whether attempted by any chief magistrate, or even by a legislature.

"One object of parliamentary inquiry, as early as 1620, was to check the abuse of martial law by the king, which had prevailed before. Tytler on Military Law, 502. The Petition of Right, in the first year of Charles I, reprobated all such arbitrary proceedings in the just terms and in the terse language of that great patriot as well as judge, Sir Edward Coke, and prayed they might be stopped and never repeated. To this the king wisely replied, 'Soit droit fait comme est désiré,' — 'Let right be done as desired.' Petition of Right in Statutes at Large, 1 Charles I.

"Putting it in force by the king alone was not only restrained by the Petition of Right early in the seventeenth century, but virtually denied as lawful by the Declaration of Rights in 1689. Tytler on Military Law, 307. Hallain, therefore, in his 'Constitutional History,' 420, declares that its use by 'the commissioners to try military offenders by martial law was a procedure necessary, within certain limits, to the discipline of an army, but unwarranted by the Constitution of this country.' Indeed, a distinguished English judge has since said, that 'martial law' as of old, now 'does not exist in England at all,' was 'contrary to the Constitution, and has been for a century totally exploded.' *Grant v. Gould*, 2 Hen. Bl. 69; 1 Hale, P. C. 346; Hale's Com. Law, chap. ii. p. 36; 1 MacArthur, 55.

"This is broad enough, and is correct as to the community generally, in both war and peace."

Will any one be bold enough to say, in view of the history of our ancestors and ourselves, that the President of the United States can extend such law as that over the entire country, or over any defined geographical part thereof, save in connection with some particular military operations which he is carrying on there? Since Charles I. lost his head, there has been no king in England who could make such law in that realm. And where is there to be found in our history or our constitutions, either State or national, any warrant for saying that a President of the United States has been empowered by the Constitution to extend martial law over the whole country, and to subject thereby to his military power every right of every citizen? He has no such authority?

In time of war, a military commander, whether he be the commander-in-chief or one of his subordinates, must possess and exercise powers both over the persons and the property of citizens which do not exist in time of peace. But he possesses and exercises such powers, not in spite of the Constitution and laws of the United States, or in derogation from their authority, but in virtue thereof and in strict subordination thereto. The general who moves his army over private property in the course of his operations in the field, or who impresses into the public service means of transportation or subsistence, to enable him to act against the enemy, or who seizes persons within his lines as spies, or destroys supplies in immediate danger of falling into the hands of the enemy, uses authority unknown to the Constitution and laws of the United States in time of peace, but not unknown to that Constitution and those laws in time of war. The power to declare war includes the power to use the customary and necessary means effectually to carry it on. As Congress may institute a state of war, it may legislate into existence and place under executive control the means for its prosecution. And, in time of war without any special legislation, not the commander-in-chief only,

but every commander of an expedition or of a military post is lawfully empowered by the Constitution and laws of the United States to do whatever is necessary, and is sanctioned by the laws of war to accomplish the lawful objects of his command. But it is obvious that this implied authority must find early limits somewhere. If it were admitted that a commanding general in the field might do whatever in his discretion might be necessary to subdue the enemy, he could levy contributions to pay his soldiers ; he could force conscripts into his service ; he could drive out of the entire country all persons not desirous to aid him : in short, he would be the absolute master of the country for the time being.

No one has ever supposed—no one will now undertake to maintain—that the commander-in-chief, in time of war, has any such lawful authority as this.

What, then, is his authority over the persons and property of citizens ? I answer, that over all persons enlisted in his forces he has military power and command ; that over all persons and property within the sphere of his actual operations in the field, he may lawfully exercise such restraint and control as the successful prosecution of his particular military enterprise may, in his honest judgment, absolutely require ; and upon such persons as have committed offences against any article of war, he may, through appropriate military tribunals, inflict the punishment prescribed by law. And there his lawful authority ends.

The military power over citizens and their property is a power to act, not a power to prescribe rules for future action. It springs from present pressing emergencies, and is limited by them. It cannot assume the functions of the statesman or legislator, and make provision for future or distant arrangements by which persons or property may be made subservient to military uses. It is the physical force of an army in the field, and may control whatever is so near as to be actually reached by that force in order to remove obstructions to its exercise.

But when the military commander controls the persons or property of citizens who are beyond the sphere of his actual operations in the field, when he makes laws to govern their conduct, he becomes a legislator. Those laws may be made actually operative: obedience to them may be enforced by military power: their purpose and effect may be solely to recruit or support his armies, or to weaken the power of the enemy with whom he is contending. But he is a legislator still; and whether his edicts are clothed in the form of proclamations or of military orders, by whatever name they may be called, they are laws. If he have the legislative power conferred on him by the people, it is well. If not, he usurps it.

He has no more lawful authority to hold all the citizens of the entire country, outside of the sphere of his actual operations in the field, amenable to his military edicts, than he has to hold all the property of the country subject to his military requisitions. He is not the military commander of the citizens of the United States, but of its soldiers.

Apply these principles to the proclamations and orders of the President. They are not designed to meet an existing emergency in some particular military operation in the field: they prescribe future rules of action touching the persons and property of citizens. They are to take effect, not merely within the scope of military operations in the field or in their neighborhood, but throughout the entire country, or great portions thereof. Their subject-matter is not military offences or military relations, but civil offences and domestic relations; the relation of master and servant; the offences of "disloyalty or treasonable practices." Their purpose is not to meet some existing and instant military emergency, but to provide for distant events which may or may not occur; and whose connections, if they should coincide with any particular military operations, are indirect, remote, casual, and possible merely.

It is manifest that, in proclaiming these edicts, the Presi-

dent is not acting under the authority of military law: first, because military law extends only over the persons actually enlisted in the military service; and, second, because these persons are governed by laws enacted by the legislative power. It is equally manifest that he is not acting under that implied authority which grows out of particular actual military operations; for these executive decrees do not spring from the special emergencies of any particular military operations, and are not limited to any field in which any such operations are carried on.

Whence, then, do these edicts spring? They spring from the assumed power to extend martial law over the whole territory of the United States,—a power for the exercise of which by the President there is no warrant whatever in the Constitution; a power which no free people could confer upon an executive officer and remain a free people. For it would make him the absolute master of their lives, their liberties, and their property, with power to delegate his mastership to such satraps as he might select, or as might be imposed on his credulity or his fears. Amidst the great dangers which encompass us, in our struggles to encounter them, in our natural eagerness to lay hold of efficient means to accomplish our vast labors, let us beware how we borrow weapons from the armory of arbitrary power. They cannot be wielded by the hands of a free people. Their blows will finally fall upon themselves.

Distracted councils, divided strength, are the very earliest effects of an attempt to use them. What lies beyond, no patriot is now willing to attempt to look upon.

[<sup>1</sup> These conclusions concerning the powers of the President cannot be shaken by the assertion that "rebels have no rights." The assertion itself is not true, in reference either to the seceding States or their people.

It is not true of those States; for the Government of the

<sup>1</sup> The passages here enclosed in brackets were inserted in the second edition.

United States has never admitted, and cannot admit, that, as States, they are in rebellion. A State is simply incapable of doing any valid act, in conflict with the Constitution or laws of the United States ; and the Constitution is as much the supreme law of the land in Tennessee to-day, as it was before the void act of secession was attempted by a part of its people. Else the act was effectual, and the State is independent of the Government of the United States, and the war is a war of conquest and subjugation.

Nor is the assertion that "rebels have no rights" applicable to the people of those States. It is strange that any one having even that acquaintance with public law which Chatham's indignant protest has made familiar to Americans, could have failed to feel it to be untrue. When many millions of people are involved in civil war, humanity, and that public law which in modern times is humane, forbid their treatment as outlaws. And if public law and the Constitution and laws of the United States are now their rules of duty towards us, on what ground shall we deny that public law and the Constitution, and the laws made under it, are also our rules of duty towards them? The only just idea of a law is that it is a rule of action which governs all who are within its scope. None are so degraded, even by crime, as to be too low for its protection; none so elevated by position or power as to be above its reach. And when we advance to that highest conception of human law, known, practically, in our own country only, and come to constitutional law, the embodied will of the people by which they govern the governors, what governors are beyond its control, what citizens are too low for its protection? Penalties and forfeitures may be inflicted by the legislative power as punishment for crime; but not even treason, the most deadly of all crimes, can set free the legislative or executive power from the restraints which the people's law has imposed on them, or remove one man or any number of men from under its protection.

But, if it were conceded that "rebels have no rights," there would still be matter demanding the gravest consideration. For the inquiry which I have invited is not what are their rights, but what are our rights.

Whatever may be thought of the wisdom of the proclamation of the President, concerning the emancipation of slaves, no one can doubt its practical importance, if it is to take effect. To set free about four millions of slaves, at an early fixed day, with absolutely no preparation for their future, and with no preparation for our future, in their relations with us, and to do this by force, must be admitted to be a matter of vast concern, not only to them and to their masters, but to the whole continent on which they must live. There may be great diversities of opinion concerning the effects of such an act. But that its effects must be of stupendous importance, extending not only into the border loyal States, but into all the States, North as well as South, I suppose no rational man can doubt. How has the President acquired the power to decide the question whether this great act shall be done? How have the people of the United States, or any part of them, conferred on him the rightful power to determine for them this question of such an emancipation, to be made under such circumstances? If the people who are in rebellion have no rights, the loyal people of Kentucky, of Indiana, Illinois, Ohio, Maryland, and Pennsylvania, have rights. It is among those rights that the President shall not assume to decide for them a question which they deem of vast practical importance to themselves, and which they have never consented he should decide. It is among the rights of all of us that the powers of each State to govern its own internal affairs should not be trespassed on by any department of the Federal power; and it is a right essential to the maintenance of our system of government. It is among the rights of all of us that the executive power should be kept within its prescribed constitutional limits, and should not legislate, by its decrees,

upon subjects of transcendent importance to the whole people.

Whether such decrees are wise or unwise, whether their subjects are citizens or not, if they are usurpations of power, our rights are both infringed and endangered. They are infringed, because the power to decide and to act is taken from the people without their consent. They are endangered, because, in a constitutional government, every usurpation of power dangerously disorders the whole framework of the State.]

A leading and influential newspaper, while expressing entire devotion to the President, and approbation of his proclamation of emancipation, says: "The Democrats talk about 'unconstitutional acts.' Nobody pretends that this act is constitutional, and nobody cares whether it is or not."

I think too well of the President to believe he has done an act involving the lives and fortunes of millions of human beings, and the entire social condition of a great people, without caring whether it is conformable to that Constitution which he has many times sworn to support.

Among all the causes of alarm which now distress the public mind, there are few more terrible to reflecting men, than the tendency to lawlessness which is manifesting itself in so many directions. No stronger evidence of this could be afforded than the open declaration of a respectable and widely circulated journal, that "nobody cares" whether a great public act of the President of the United States is in conformity with or is subversive of the supreme law of the land,—the only basis upon which the government rests; that our public affairs have become so desperate, and our ability to retrieve them by the use of honest means is so distrusted, and our willingness to use other means so undoubted, that our great public servants may themselves break the fundamental laws of the country, and become usurpers of vast powers not intrusted to them, in violation of their solemn oaths of office; and "nobody cares."

It is not believed that this is just to the people of the United States. They do care, and the President cares, that he and all other public servants should obey the Constitution. Partisan journals, their own honest and proper desire to support the President,—on whose wisdom and firmness they rely to relieve their country from its evils and dangers,—and the difficulties which the mass of the people encounter in forming opinions on questions of constitutional law, may prevent them for a limited time from arriving at a just judgment of such questions, or of the vast practical effects dependent on them.

But the people of the United States do not expect national concord to spring from usurpations of power; or national security from the violation of those great principles of public liberty which are the only possible foundation in this country of private safety and of public order. Their instincts demand a purer and more comprehensive statesmanship than that which seizes upon unlawful expedients, because they may possibly avert for the moment some threatening danger, at the expense of the violation of great principles of free government, or of the destruction of some necessary safeguard of individual security.

It is a subject of discussion in the public journals whether it is the intention of the Executive to use the powers asserted in the last proclamation, and in the orders of the Secretary of War, to suppress free discussion of political subjects. I have confidence in the purity and the patriotism both of the President and of the Secretary of War. I fear no such present application of this proclamation and these orders by them. But the execution of such powers must be intrusted to subordinate agents, and it is of the very essence of arbitrary power that it should be in hands which can act promptly and efficiently, and unchecked by forms. These great powers must be confided to persons actuated by party or local or personal feelings and prejudices; or, what would often prove as ruinous to the citizen, actuated by a desire

to commend their vigilance to their employers, and by a blundering and stupid zeal in their service.

But it is not this or that particular application of power which is to be considered. It is the existence of the power itself, and the uses of which it is susceptible, while following out the principle on which it has been assumed.

The uses of power, even in despotic monarchies, are more or less controlled by usages and customs, or, in other words, by public opinion. In good hands, and in favorable times, despotic power is not commonly allowed to be felt to be oppressive; and always the forms of a free government, which has once existed, so far as is practicable, are carefully and speciously preserved. But a wise people does not trust its condition and rights to the happy accident of favorable times or good hands. It is jealous of power. It knows that of all earthly things it is that thing most likely to be abused; and, when it affects a nation, most destructive by its abuse. They will rouse themselves to consider what is the power claimed; what is its origin; what is its extent; what uses may be made of it in dangerous times, and by men likely to be produced in such times; and while they will trust their public servants, and will pour out their dearest blood like water to sustain them in their honest measures for their country's salvation, they will demand of those servants obedience to their will, as expressed in the fundamental laws of the government, to the end that there shall not be added to all the sufferings and losses they have uncomplainingly borne that most irreparable of all earthly losses,—the ruin of the principles of their free government.

What, then, is to be done? Are we to cease our utmost efforts to save our country, because its chief magistrate seems to have fallen, for the time being, into what we believe would be fatal errors, if persisted in by him and acquiesced in by ourselves? Certainly not. Let the people but be right, and no President can long be wrong; nor can he effect any fatal mischief, if he should be.

The sober second thought of the people has yet a controlling power. Let this gigantic shadow, which has been evoked out of the powers of the commander-in-chief, once be placed before the people, so that they can see clearly its proportions and its mien, and it will dissolve and disappear like the morning cloud before the rising sun.

The people yet can and will take care, by legitimate means, without disturbing any principle of the Constitution, or violating any law, or relaxing any of their utmost efforts for their country's salvation, that their will, embodied in the Constitution, shall be obeyed. If it needs amendment, they will amend it themselves. They will suffer nothing to be added to it, or taken from it, by any other power than their own. If they should, neither the Government itself, nor any right under it, will any longer be theirs.

## CHARACTER AND PUBLIC SERVICES OF CHIEF JUSTICE TANEY.

REMARKS MADE AT A MEETING OF THE BOSTON BAR,

OCTOBER 15, 1864.

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AT a meeting of the members of the Bar of the First Circuit, held at Boston on Saturday, the fifteenth day of October, 1864, to take measures for giving expression to the feelings of the Bar on occasion of the death of Chief Justice Taney, the meeting having been called to order by Richard H. Dana, Jr., Attorney of the United States, Sidney Bartlett was appointed Chairman; and Elias Merwin, Secretary.

On motion of Mr. Dana, a committee, consisting of Benjamin R. Curtis, Caleb Cushing, Richard H. Dana, Jr., and Sidney Bartlett, was appointed to prepare and report resolutions for the consideration of the Bar.

At an adjourned meeting, held Monday, the seventeenth day of October, 1864, the following resolutions, reported by Benjamin R. Curtis in behalf of the committee, were unanimously adopted, namely:—

*“Resolved*, That the members of this Bar render the tribute of their admiration and reverence for the pre-eminent abilities, profound learning, incorruptible integrity, and signal private virtues, exhibited in the long and illustrious judicial career of the late lamented Chief Justice Taney.

"*Resolved*, That the Attorney of the United States be requested to communicate these proceedings to the Court, and ask to have them entered on the records of the Court.

"SIDNEY BARTLETT, *Chairman.*

"ELIAS MERWIN, *Secretary.*"

Mr. B. R. Curtis then addressed the Court:—

"*May it please the Court:* I have been requested to second the resolutions which Mr. Attorney has presented. I suppose the reason for this request is that for six years I was in such official connection with the late Chief Justice as enabled me to know him better than the other members of this Bar. My intimate association with him began in the autumn of 1851. He was then seventy-three years old, — a period of life when, the Scripture admonishes us and the experience of mankind proves, it is best for most men to seek that repose which belongs to old age. But it was not best for him.

"I observe that it has been recently said, by one who had known him upwards of forty years, that during all those years there had never been a time when his death might not reasonably have been anticipated within the next six months. Such was the impression produced on me when I first knew him. His tall, thin form, not much bent with the weight of years, but exhibiting in his carriage and motions great muscular weakness, the apparent feebleness of his vital powers, the constant and rigid care necessary to guard what little health he had, strongly impressed casual observers with the belief that the remainder of his days must be short. But a more intimate acquaintance soon produced the conviction that his was no ordinary case, because he was no ordinary man. An accurate knowledge of his own physical condition and its necessities; an unyielding will, which, while it conformed every thing to those necessities, braced and vivified the springs of life; a temper which long discipline had made calm and cheerful; and the

consciousness that he occupied and continued usefully to fill a great and difficult office, whose duties were congenial to him, gave assurance, which the event has justified, that his life would be prolonged much beyond the allotted years of man.

" In respect to his mental powers, there was not then, nor at any time while I knew him intimately, any infirmity or failure whatever. I believe the memory is that faculty which first feels the stiffness of old age. His memory was and continued to be as alert and true as that of any man I ever knew. In consultation with his brethren, he could, and habitually did, state the facts of a voluminous and complicated case, with every important detail of names and dates, with extraordinary accuracy, and, I may add, with extraordinary clearness and skill. And his recollection of principles of law and of the decisions of the court over which he presided was as ready as his memory of facts.

" He had none of the querulousness which too often accompanies old age. There can be no doubt that his was a vehement and passionate nature; but he had subdued it. I have seen him sorely tried when the duly observable effects of the trial were silence and a flushed cheek. So long as he lived, he preserved that quietness of temper and that consideration for the feelings and wishes of others which were as far as possible removed from weak and selfish querulousness. And I believe it may truly be said, that though the increasing burden of years had somewhat diminished his bodily strength, yet down to the close of the last term of the Supreme Court his presence was felt to be as important as at any period of his life.

" I have been long enough at the Bar to remember Mr. Taney's appointment; and I believe it was then a general impression, in this part of the country, that he was neither a learned nor a profound lawyer. This was certainly a mistake. His mind was thoroughly imbued with the rules of the common law and of equity law; and, whatever may have been true at the time of his appointment, when I first

knew him he was master of all that peculiar jurisprudence which it is the special province of the courts of the United States to administer and apply. His skill in applying it was of the highest order. His power of subtle analysis exceeded that of any man I ever knew,—a power not without its dangers to a judge as well as to a lawyer; but in his case it was balanced and checked by excellent common sense and by great experience in practical business, both public and private. His physical infirmities disqualifed him from making those learned researches, with the results of which other great judges have illustrated and strengthened their written judgments; but it can be truly said of him that he rarely felt the need of them. The same cause prevented him from writing so large a proportion of the opinions of the court as his eminent predecessor; and it has seemed to me probable that for this reason his real importance in the court may not have been fully appreciated, even by the Bar of his own time. For it is certainly true—and I am happy to be able to bear direct testimony to it—that the surpassing ability of the Chief Justice, and all his great qualities of character and mind, were more fully and constantly exhibited in the consultation-room, while presiding over and assisting the deliberations of his brethren, than the public knew, or can ever justly appreciate. There, his dignity, his love of order, his gentleness, his caution, his accuracy, his discrimination, were of incalculable importance. The real intrinsic character of the tribunal was greatly influenced by them, and always for the better.

“How he presided over the public sessions of the court, some who hear me know. The blandness of his manner, the promptness, precision, and firmness which made every word he said weighty, and made very few words necessary, and the unflagging attention which he fixed on every one who addressed the court, will be remembered by all.

“But all may not know that he had other attainments and qualities important to the prompt, orderly, and safe

despatch of business. In the time of his predecessor, the practice of the court is understood to have been somewhat loosely administered. The amount of business in the court was then comparatively so small that this occasioned no real detriment, probably no considerable inconvenience. But when the docket became crowded with causes, and heavy arrears were accumulated, it would have been quite otherwise. The Chief Justice made himself entirely familiar with the rules of practice of the court and with the circumstances out of which they had arisen. He had a natural aptitude to understand, and, so far as was needed, to reform the system. It was almost a necessity of his character to have it practically complete. It *was* a necessity of his character to administer it with unyielding firmness. I have not looked back to the reports to verify the fact, but I have no doubt it may be found there, that, even when so infirm that he could not write other opinions, he uniformly wrote the opinions of the court upon new points of its practice. He had no more than a just estimate of their importance. The business of the Supreme Court came thither from nearly the whole of a continent. It arose out of many systems of laws, differing from each other in important particulars. It was conducted by counsel who travelled long distances to attend the court. It included the most diverse cases tried in the lower courts in many different modes of procedure,—some according to the course of the common law, some under the pleadings and practice of the courts of chancery in England, some under forms borrowed from the French law, many under special laws of the United States framed for the execution of treaties, and many more so anomalous that it would not be easy to reduce them to any classification. And the tribunal itself, though it was absolutely supreme within the limits of its powers, was bounded and circumscribed in its jurisdiction by the Constitution and by Acts of Congress, which it was necessary constantly to regard. Let it be remembered, also,—for just now we

may be in some danger of forgetting it,—that questions of jurisdiction were questions of power as between the United States and the several States. The practice of the court therefore involved not merely the orderly and convenient conduct of this vastly diversified business, drawn from a territory so vast, but questions of constitutional law, running deep into the framework of our complicated political system. Upon this entire subject, the Chief Justice was vigilant, steady, and thoroughly informed. Doubtless, it would be the tendency of most second-rate minds, and of not a few first-rate minds, to press such a jurisdiction out to its extremest limits, and occasionally beyond them; while for timid men, or for those who might come to that Bench with formed prejudices, the opposite danger would be imminent. Perhaps I may be permitted to say that, though on the only important occasions on which I had the misfortune to differ with the Chief Justice on such points, I thought he and they who agreed with him carried the powers of the court too far, yet, speaking for myself, I am quite sure he fell into neither of these extremes. The great powers intrusted to the court by the Constitution and laws of his country he steadily and firmly upheld and administered; and, so far as I know, he showed no disposition to exceed them.

"I have already adverted to the fact that his physical infirmities rendered it difficult for him to write a large proportion of the opinions of the court. But my own impression is that this was not the only reason why he was thus abstinent. He was as absolutely free from the slightest trace of vanity and self-conceit as any man I ever knew. He was aware that many of his associates were ambitious of doing this conspicuous part of their joint labor. The preservation of the harmony of the members of the court, and of their good-will to himself, was always in his mind. And I have not the least doubt that these considerations often influenced him to request others to prepare opinions which he could and otherwise would have written. As it

was, he has recorded many which are important, some which are very important. This does not seem to me to be the occasion to specify, still less to criticise them. They are all characterized by that purity of style and clearness of thought which marked whatever he wrote or spoke ; and some of them must always be known and recurred to as masterly discussions of their subjects.

“ It is one of the favors which the providence of God has bestowed on our once happy country, that for the period of sixty-three years this great office has been filled by only two persons, each of whom has retained to extreme old age his great and useful qualities and powers. The stability, uniformity, and completeness of our national jurisprudence are in no small degree attributable to this fact. The last of them has now gone. God grant that there may be found a successor true to the Constitution, able to expound and willing to apply it to the portentous questions which the passions of men have made.”

## ARGUMENT IN DEFENCE OF PRESIDENT JOHNSON.

DELIVERED BEFORE THE SENATE OF THE UNITED STATES, SITTING AS A COURT OF IMPEACHMENT,

APRIL 9, 10, 1868.

The history of the impeachment, so far as it was necessary to elucidate the part taken in the trial by Judge Curtis, is given *ante*, vol. i. chap. xiii.

THURSDAY, April 9, 1868.

THE CHIEF JUSTICE. The managers of the House of Representatives state that the evidence on their part, with the exception just indicated, is closed. Gentlemen of counsel for the President, you will proceed with the defence.

Mr. CURTIS, of counsel for the respondent, rose and said:

Mr. Chief Justice, I am here to speak to the Senate of the United States sitting in its judicial capacity as a court of impeachment, presided over by the Chief Justice of the United States, for the trial of the President of the United States. This statement sufficiently characterizes what I have to say. Here party spirit, political schemes, foregone conclusions, outrageous biases can have no fit operation. The Constitution requires that here should be a "trial;" and, as in that trial the oath which each one of you has taken is to administer "impartial justice according to the Constitution and the laws," the only appeal which I can make in behalf of the President is an appeal to the conscience and the reason of each judge who sits before me. Upon the law and the facts, upon the judicial merits of the case, upon the duties incumbent on that high officer by vir-

tue of his office, and his honest endeavor to discharge those duties, the President rests his defence. And I pray each one of you to listen to me with that patience which belongs to a judge for his own sake, which I cannot expect to command by any efforts of mine, while I open to you what that defence is.

The honorable managers, through their associate who has addressed you [Mr. Butler], have informed you that this is not a court, and that, whatever may be the character of this body, it is bound by no law. Upon those subjects I shall have something hereafter to say. The honorable manager did not tell you, in terms at least, that here are no articles before you, because a statement of that fact would be in substance to say that here are no honorable managers before you; inasmuch as the only authority with which the honorable managers are clothed by the House of Representatives is an authority to present here at your bar certain articles, and within their limits conduct this prosecution; and, therefore, I shall make no apology, senators, for asking your close attention to these articles, one after the other, in manner and form as they are here presented, to ascertain in the first place what are the substantial allegations in each of them, what is the legal operation and effect of those allegations, and what proof is necessary to be adduced in order to sustain them; and I shall begin with the first, not merely because the House of Representatives, in arranging these articles, have placed that first in order, but because the subject-matter of that article is of such a character that it forms the foundation of the first eight articles in the series, and enters materially into two of the remaining three.

What, then, is the substance of this first article? What, as the lawyers say, are the *gravamina* contained in it? There is a great deal of verbiage—I do not mean by that unnecessary verbiage—in the description of the substantive matters set down in this article. Stripped of that verbiage,

it amounts exactly to these things: first, that the order set out in the article for the removal of Mr. Stanton, if executed, would be a violation of the tenure-of-office act; second, that it was a violation of the tenure-of-office act; third, that it was an intentional violation of the tenure-of-office act; fourth, that it was a violation of the Constitution of the United States; and, fifth, was by the President intended to be so. Or, to draw all this into one sentence which yet may be intelligible and clear enough, I suppose the substance of this first article is that the order for the removal of Mr. Stanton was, and was intended to be, a violation of the tenure-of-office act, and was intended to be a violation of the Constitution of the United States. These are the allegations which it is necessary for the honorable managers to make out in proof, to support that article.

Now, there is a question involved here which enters deeply, as I have already intimated, into the first eight articles in this series, and materially touches two of the others; and to that question I desire in the first place to invite the attention of the court. That question is whether Mr. Stanton's case comes under the tenure-of-office act. If it does not,—if the true construction and effect of the tenure-of-office act, when applied to the facts of his case, exclude it,—then it will be found by honorable senators, when they come to examine this and the other articles, that a mortal wound has been inflicted upon them by that decision. I must therefore ask your attention to the construction and application of the first section of the tenure-of-office act. It is, as senators know, but dry work: it requires close, careful attention and reflection; no doubt it will receive them. Allow me, in the first place, to read that section:—

That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in a like

manner appointed and duly qualified, except as herein otherwise provided.

Then comes what is “otherwise provided :”—

*Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney-General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

Here is a section, then, the body of which applies to all civil officers, as well to those then in office as to those who should thereafter be appointed. The body of that section contains a declaration that every such officer “is,” — that is, if he is now in office, — “and shall be,” — that is, if he shall hereafter be appointed to office, — entitled to hold until a successor is appointed and qualified in his place. That is the body of the section. But out of this body of the section it is explicitly declared that there is to be excepted a particular class of officers, “except as herein otherwise provided.” There is to be excepted out of this general description of all civil officers a particular class of officers as to whom something is “otherwise provided ;” that is, a different rule is to be announced for them.

The Senate will perceive that in the body of the section all officers, as well those then holding office as those thereafter to be appointed, are included. The language is:—

Every person holding any civil office to which he has been appointed, . . . and every person who shall hereafter be appointed, . . . is and shall be entitled, &c.

It affects the present; it sweeps over all who are in office and come within the body of the section; it includes by its terms as well all those now in office as those who may be hereafter appointed. But, when you come to the proviso, the first noticeable thing is that this language is changed: it is not that “every Secretary who now is, and hereafter

may be, in office, shall be entitled to hold that office" by a certain rule which is here prescribed; but the proviso, while it fixes a rule for the future only, makes no declaration of the present right of one of this class of officers; and the question whether any particular Secretary comes within that rule depends on another question, whether his case comes within the description contained in the proviso. There is no language which expressly brings him within the proviso; there is no express declaration, as in the body of the section, that "he is, and hereafter shall be, entitled," merely because he holds the office of Secretary at the time of the passage of the law. There is nothing to bring him within the proviso, I repeat, unless the description which the proviso contains applies to and includes his case. Now, let us see if it does:—

That the Secretaries of State, &c., shall hold their offices respectively for and during the term of the President by whom they may have been appointed.

The first inquiry which arises on this language is as to the meaning of the words "for and during the term of the President." Mr. Stanton, as appears by the commission which has been put into the case by the honorable managers, was appointed in January, 1862, during the first term of President Lincoln. Are these words, "during the term of the President," applicable to Mr. Stanton's case? That depends upon whether an expounder of this law judicially, who finds set down in it as a part of the descriptive words "during the term of the President," has any right to add "and any other term for which he may afterward be elected." By what authority short of legislative power can those words be put into the statute, so that "during the term of the President" shall be held to mean "and any other term or terms for which the President may be elected"? I respectfully submit no such judicial interpretation can be put on the words.

Then, if you please, take the next step. "During the term of the President by whom he was appointed." At the time when this order was issued for the removal of Mr. Stanton, was he holding "during the term of the President by whom he was appointed"? The honorable managers say yes, because, as they say, Mr. Johnson is merely serving out the residue of Mr. Lincoln's term. But is that so under the provisions of the Constitution of the United States? I pray you to allow me to read two clauses which are applicable to this question. The first is the first section of the second article:—

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows.

There is a declaration that the President and the Vice-President is each respectively to hold his office for the term of four years; but that does not stand alone: here is its qualification:—

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President.

So that, although the President, like the Vice-President, is elected for a term of four years, and each is elected for the same term, the President is not to hold his office absolutely during four years. The limit of four years is not an absolute limit. Death is a limit. A "conditional limitation," as the lawyers call it, is imposed on his tenure of office. And when, according to this second passage which I have read, the President dies, his term of four years for which he was elected, and during which he was to hold, provided he should so long live, terminates, and the office devolves on the Vice-President. For what period of time? For the remainder of the term for which the Vice-President was elected. And there is no more propriety, under these

provisions of the Constitution of the United States, in calling the time during which Mr. Johnson holds the office of President after it was devolved upon him a part of Mr. Lincoln's term, than there would be propriety in saying that one sovereign who succeeded to another sovereign by death holds a part of his predecessor's term. The term assigned to Mr. Lincoln by the Constitution was conditionally assigned to him. It was to last four years, if not sooner ended; but, if sooner ended by his death, then the office was devolved on the Vice-President, and the term of the Vice-President to hold the office then began.

I submit, then, that upon this language of the act it is apparent that Mr. Stanton's case cannot be considered as within it. This law, however, as senators very well know, had a purpose: there was a practical object in the view of Congress; and, however clear it might seem that the language of the law when applied to Mr. Stanton's case would exclude that case, however clear that might seem on the mere words of the law, if the purpose of the law could be discerned, and that purpose plainly required a different interpretation, that different interpretation should be given. But, on the other hand, if the purpose in view was one requiring that interpretation to which I have been drawing your attention, then it greatly strengthens the argument; because not only the language of the act itself, but the practical object which the legislature had in view in using that language, demands that interpretation.

Now, there can be no dispute concerning what that purpose was, as I suppose. Here is a peculiar class of officers singled out from all others and brought within this provision. Why is this? It is because the Constitution has provided that these principal officers in the several executive departments may be called upon by the President for advice "respecting"—for that is the language of the Constitution—"their several duties;" not, as I read the Constitution, that he may call upon the Secretary of War for advice

concerning questions arising in the Department of War. He may call upon him for advice concerning questions which are a part of the duty of the President, as well as questions which belong only to the Department of War. Allow me to read that clause of the Constitution, and see if this be not its true interpretation. The language of the Constitution is:—

He [the President] may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices.

As I read it, relating to the duties of the offices of these principal officers, or relating to the duties of the President himself. At all events, such was the practical interpretation put upon the Constitution from the beginning of the Government; and every gentleman who listens to me, who is familiar, as you all are, with the political history of the country, knows that from an early period of the administration of General Washington his Secretaries were called upon for advice concerning matters not within their respective departments, and so the practice has continued from that time to this. This is one thing which distinguishes this class of officers from any other embraced within the body of the law.

But there is another. The Constitution undoubtedly contemplated that there should be executive departments created, the heads of which were to assist the President in the administration of the laws as well as by their advice. They were to be the hands and the voice of the President; and accordingly that has been so practised from the beginning, and the legislation of Congress has been framed on this assumption in the organization of the departments, and emphatically in the act which constituted the Department of War. That provides, as senators well remember, in so many words, that the Secretary of War is to discharge such duties of a general description there given as shall be assigned

to him by the President, and that he is to perform them under the President's instructions and directions.

Let me repeat that the Secretary of War and the other Secretaries, the Postmaster-General, and the Attorney-General, are deemed to be the assistants of the President in the performance of his great duty to take care that the laws are faithfully executed; that they speak for and act for him. Now, do not these two views furnish the reasons why this class of officers was excepted out of the law? They were to be the advisers of the President: they were to be the immediate confidential assistants of the President, for whom he was to be responsible, but in whom he was expected to repose a great amount of trust and confidence; and therefore it was that this act has connected the tenure of office of these Secretaries to which it applies with the President by whom they were appointed. It says, in the description which the act gives of the future tenure of office of Secretaries, that a controlling regard is to be had to the fact that the Secretary whose tenure is to be regulated was appointed by some particular President, and during the term of that President he shall continue to hold his office; but as for Secretaries who are in office, not appointed by the President, we have nothing to say: we leave them as they heretofore have been. I submit to senators that this is the natural, and, having regard to the character of these officers, the necessary conclusion: that the tenure of the office of a Secretary here described is a tenure during the term of service of the President by whom he was appointed; that it was not the intention of Congress to compel a President of the United States to continue in office a Secretary not appointed by himself.

We have, however, fortunately, not only the means of interpreting this law which I have alluded to,—namely, the language of the act, the evident character and purpose of the act,—but we have decisive evidence of what was intended and understood to be the meaning and effect of this law in

each branch of Congress at the time when it was passed. In order to make this more apparent, and its just weight more evident, allow me to state what is very familiar, no doubt, to senators, but which I wish to recall to their minds, the history of this proviso, this exception.

The bill, as senators will recollect, originally excluded these officers altogether. It made no attempt — indeed, it rejected all attempts — to prescribe a tenure of office for them, as inappropriate to the necessities of the Government. So the bill went to the House of Representatives. It was there amended by putting the Secretaries on the same footing as all other civil officers appointed with the advice and consent of the Senate, and, thus amended, came back to this body. This body disagreed to the amendment. Thereupon, a committee of conference was appointed; and that committee, on the part of the House, had for its chairman Hon. Mr. Schenck, of Ohio; and, on the part of this body, Hon. Mr. Williams, of Oregon, and Hon. Mr. Sherman, of Ohio. The committee of conference came to an agreement to alter the bill by striking these Secretaries out of the body of the bill, and inserting them in the proviso containing the matter now under consideration. Of course, when this report was made to the House of Representatives and to this body, it was incumbent on the committee charged with looking after its intentions and estimates of the public necessities in reference to that conference, — it was expected that they would explain what had been agreed to, with a view that the body itself, thus understanding what had been agreed to be done, could proceed to act intelligently on the matter.

Now, I wish to read to the Senate the explanation given by Hon. Mr. Schenck, the chairman of this conference on the part of the House, when he made his report to the House concerning this proviso. After the reading of the report, Mr. Schenck said: —

I propose to demand the previous question upon the question of agreeing to the report of the committee of conference. But, before

doing so, I will explain to the House the condition of the bill, and the decision of the conference committee upon it. It will be remembered that by the bill, as it passed the Senate, it was provided that the concurrence of the Senate should be required in all removals from office, except in the case of the heads of departments. The House amended the bill of the Senate so as to extend this requirement to the heads of departments as well as to other officers.

The committee of conference have agreed that the Senate shall accept the amendment of the House. But, inasmuch as this would compel the President to keep around him heads of departments until the end of his term, who would hold over to another term, a compromise was made by which a further amendment is added to this portion of the bill, so that the term of office of the heads of departments shall expire with the term of the President who appointed them, allowing those heads of departments one month longer, in which, in case of death or otherwise, other heads of departments can be named. This is the whole effect of the proposition reported by the committee of conference: it is, in fact, an acceptance by the Senate of the position taken by the House. (*Congressional Globe*, thirty-ninth Congress, second session, p. 1340.)

Then a question was asked, whether it would be necessary that the Senate should concur in all other appointments, &c.; in reply to which Mr. Schenck said:—

That is the case. But their terms of office,—

That is, the Secretaries' terms of office —

are limited, as they are not now limited by law, so that they expire with the term of service of the President who appoints them, and one month after, in case of death or other accident, until others can be substituted for them by the incoming President. (*Ibid.*)

Allow me to repeat that sentence:—

They expire with the term of service of the President who appoints them, and one month after, in case of death or other accident.

In this body, on the report being made, the chairman, Hon. Mr. Williams, made an explanation. That explanation was, in substance, the same as that made by Mr. Schenck

in the House ; and thereupon a considerable debate sprang up, which was not the case in the House, for this explanation of Mr. Schenck was accepted by the House as correct, and unquestionably was acted upon by the House as giving the true sense, meaning, and effect of this bill. In this body, as I have said, a considerable debate sprang up. It would take too much of your time and too much of my strength to undertake to read this debate, and there is not a great deal of it which I can select so as to present it fairly and intelligibly without reading the accompanying parts ; but I think the whole of it may fairly be summed up in this statement : that it was charged by one of the honorable senators from Wisconsin that it was the intention of those who favored this bill to keep in office Mr. Stanton and certain other Secretaries. That was directly met by the honorable senator from Ohio—one of the members of the committee of conference — by this statement :—

I do not understand the logic of the senator from Wisconsin. He first attributes a purpose to the committee of conference which I say is not true. I say that the Senate have not legislated with a view to any persons or any President, and therefore he commences by asserting what is not true. We do not legislate in order to keep in the Secretary of War, the Secretary of the Navy, or the Secretary of State. (*Ibid.*, p. 1516.)

Then a conversation arose between the honorable senator from Ohio and another honorable senator, and the honorable senator from Ohio continued thus :—

That the Senate had no such purpose is shown by its vote twice to make this exception. That this provision does not apply to the present case is shown by the fact that its language is so framed as not to apply to the present President. The senator shows that himself, and argues truly that it would not prevent the present President from removing the Secretary of War, the Secretary of the Navy, and the Secretary of State. And if I supposed that either of these gentlemen was so wanting in manhood, in honor, as to hold his place after the politest intimation by the President of

the United States that his services were no longer needed, I certainly, as a senator, would consent to his removal at any time, and so would we all. (*Ibid.*, p. 1516.)

I read this, senators, not as expressing the opinion of an individual senator concerning the meaning of a law which was under discussion and was about to pass into legislation. I read it as the report, for it is that in effect,—the explanation, rather, of the report of the committee of conference appointed by this body to see whether this body could agree with the House of Representatives in the frame of this bill, which committee came back here with a report that a certain alteration had been made and agreed upon by the committee of conference, and that its effect was what is above stated. And now I ask the Senate—looking at the language of this law, looking at its purpose, looking at the circumstances under which it was passed, the meaning thus attached to it by each of the bodies which consented to it —whether it is possible to hold that Mr. Stanton's case is within the scope of that tenure-of-office act? I submit it is not possible.

I now return to the allegations in this first article; and the first allegation, as senators will remember, is that the issuing of the order which is set out in the article was a violation of the tenure-of-office act. It is perfectly clear that is not true. The tenure-of-office act in the sixth section enacts “that every removal, appointment, or employment, made, had, or exercised, contrary to the provisions of this act,” &c., shall be deemed a high misdemeanor. “Every removal contrary to the provisions of this act.” In the first place, no removal has taken place. They set out an order. If Mr. Stanton had obeyed that order, there would have been a removal; but, inasmuch as Mr. Stanton disobeyed that order, there was no removal. So it is quite clear that, looking to this sixth section of the act, they have made out no case of a removal within its terms; and, therefore, no case of violation of the act by a removal. But it

must not only be a removal, it must be “contrary to the provisions of this act;” and, therefore, if you could hold the order to be in effect a removal, unless Mr. Stanton’s case was within this act, unless this act gave Mr. Stanton a tenure of office and protected it, of course the removal — even if it had been actual instead of attempted merely — would not have been “contrary to the provisions of the act,” for the act had nothing to do with it.

But this article, as senators will perceive on looking at it, does not allege simply that the order for the removal of Mr. Stanton was a violation of the tenure-of-office act. The honorable House of Representatives have not, by this article, attempted to erect a mistake into a crime. I have been arguing to you at considerable length, no doubt trying your patience thereby, the construction of that tenure-of-office law. I have a clear idea of what its construction ought to be. Senators, more or less of them who have listened to me, may have a different view of its construction; but I think they will in all candor admit that there is a question of construction: there is a question of what the meaning of this law was, — a question whether it was applicable to Mr. Stanton’s case, — a very honest and solid question which any man could entertain; and, therefore, I repeat it is important to observe that the honorable House of Representatives have not, by this article, endeavored to charge the President with a high misdemeanor because he had been honestly mistaken in construing that law. They go further, and take the necessary step. They charge him with intentionally misconstruing it: they say, “Which order was unlawfully issued with intention then and there to violate said act.” So that, in order to maintain the substance of this article, without which it was not designed by the House of Representatives to stand, and cannot stand, it is necessary for them to show that the President wilfully misconstrued this law; that having reason to believe, and actually believing, after the use of due inquiry, that Mr. Stanton’s

case was within the law, he acted as if it was not within the law. That is the substance of the charge.

What of the proof in support of that allegation offered by the honorable managers? Senators must undoubtedly be familiar with the fact that the office of President of the United States, as well as many other executive offices, and to some extent legislative offices, call upon those who hold them for the exercise of judgment and skill in the construction and application of laws. It is true that the strictly judicial power of the country, technically speaking, is vested in the Supreme Court and such inferior courts as Congress from time to time have established or may establish. But there is a great mass of work to be performed by executive officers in the discharge of their duties, which is of a judicial character. Take, for instance, all that is done in the auditing of accounts: that is judicial, whether it be done by an auditor or a comptroller, or whether it be done by a chancellor; and the work has the same character, whether done by one or by the other. They must construe and apply the laws; they must investigate and ascertain facts; they must come to some results compounded of the law and of the facts.

Now, this class of duties the President of the United States has to perform. A case is brought before him, which, in his judgment, calls for action: his first inquiry must be, What is the law on the subject? He encounters, among other things, this tenure-of-office law in the course of his inquiry. His first duty is to construe that law; to see whether it applies to the case; to use, of course, in doing so, all those means and appliances which the Constitution and the laws of the country have put into his hands to enable him to come to a correct decision. But, after all, he must decide in order either to act or to refrain from action.

That process the President in this case was obliged to go through, and did go through; and he came to the conclusion that the case of Mr. Stanton was not within this law. He

came to that conclusion, not merely by an examination of this law himself, but by resorting to the advice which the Constitution and laws of the country enable him to call for to assist him in coming to a correct conclusion. Having done so, are the Senate prepared to say that the conclusion he reached must have been a wilful misconstruction,—so wilful, so wrong, that it can justly and properly, and for the purpose of this prosecution, effectively be termed a high misdemeanor? How does the law read? What are its purposes and objects? How was it understood here at the time when it was passed? How is it possible for this body to convict the President of the United States of a high misdemeanor for construing a law as those who made it construed it at the time when it was made?

I submit to the Senate that thus far no great advance has been made toward the conclusion either that the allegation in this article that this order was a violation of the tenure-of-office act is true, or that there was an intent on the part of the President thus to violate it. And, although we have not yet gone over all the allegations in this article, we have met its “head and front;” and what remains will be found to be nothing but incidental and circumstantial, and not the principal subject. If Mr. Stanton was not within this act, if he held the office of Secretary for the Department of War at the pleasure of President Johnson as he held it at the pleasure of President Lincoln, if he was bound by law to obey that order which was given to him, and quit the place instead of being sustained by law in resisting that order, I think the honorable managers will find it extremely difficult to construct out of the broken fragments of this article any thing which will amount to a high misdemeanor. What are they? They are, in the first place, that the President did violate, and intended to violate, the Constitution of the United States by giving this order. Why? They say, as I understand it, because the order of removal was made during the session of the Senate; that for that reason the

order was a violation of the Constitution of the United States.

I desire to be understood on this subject. If I can make my own ideas of it plain, I think nothing is left of this allegation. In the first place, the case, as senators will observe, which is now under consideration, is the case of a Secretary of War holding during the pleasure of the President by the terms of his commission; holding under the act of 1789, which created that department, which, although it does not affect to confer on the President the power to remove the Secretary, does clearly imply that he has that power by making a provision for what shall happen in case he exercises it. That is the case which is under consideration, and the question is this: whether, under the law of 1789 and the tenure of office created by that law,—designedly created by that law, after the great debate of 1789,—and whether under a commission which conforms to it, holding during the pleasure of the President, the President could remove such a Secretary during the session of the Senate. Why not? Certainly there is nothing in the Constitution of the United States to prohibit it. The Constitution has made two distinct provisions for filling offices. One is by nomination to the Senate and confirmation by them, and a commission by the President upon that confirmation: the other is by commissioning an officer when a vacancy happens during the recess of the Senate. But the question now before you is not a question how vacancies shall be filled; that the Constitution has thus provided for: it is a question how they may be created, and when they may be created,—a totally distinct question.

Whatever may be thought of the soundness of the conclusion arrived at upon the great debate in 1789 concerning the tenure of office, or concerning the power of removal from office, no one, I suppose, will question that a conclusion was arrived at; and that conclusion was that the Constitution had lodged with the President the power of

removal from office independently of the Senate. This may be a decision proper to be reversed: it may have been now reversed,—of that I say nothing at present; but that it was made, and that the legislation of Congress of 1789, and so on down during the whole period of legislation to 1867, proceeded upon the assumption, express or implied, that that decision had been made, nobody who understands the history of the legislation of the country will deny.

Consider, if you please, what this decision was. It was that the Constitution had lodged this power in the President; that he alone was to exercise it; that the Senate had not and could not have any control whatever over it. If that be so, of what materiality is it whether the Senate is in session or not? If the Senate is not in session, and the President has this power, a vacancy is created; and the Constitution has made provision for filling that vacancy by commission until the end of the next session of the Senate. If the Senate is in session, then the Constitution has made provision for filling a vacancy which is created by a nomination to the Senate; and the laws of the country, as I am presently going to show you somewhat in detail, have made provisions for filling it *ad interim* without any nomination, if the President is not prepared to make a nomination at the moment when he finds the public service requires the removal of an officer. So that, if this be a case within the scope of the decision made by Congress in 1789, and within the scope of the legislation which followed upon that decision, it is a case where either by force of the Constitution the President had the power of removal without consulting the Senate, or else the legislation of Congress had given it to him; and, either way, neither the Constitution nor the legislation of Congress had made it incumbent on him to consult the Senate on the subject.

I submit, then, that if you look at this matter of Mr. Stanton's removal just as it stands on the decision in 1789, or on the legislation of Congress following upon that deci-

sion, and in accordance with which are the terms of the commission under which Mr. Stanton held office, you must come to the conclusion, without any further evidence on the subject, that the Senate had nothing whatever to do with the removal of Mr. Stanton, either to advise for it or to advise against it; that it came either under the constitutional power of the President, as it had been interpreted in 1789, or it came under the grant made by the legislature to the President in regard to all those secretaries not included within the tenure-of-office bill. This, however, does not rest simply upon this application of the Constitution and of the legislation of Congress. There has been, and we shall bring it before you, a practice by the Government, going back to a very early day, and coming down to a recent period, for the President to make removals from office when the case called for them, without regard to the fact whether the Senate was in session or not. The instances, of course, would not be numerous. If the Senate was in session, the President would send a nomination to the Senate, saying, "A B, in place of C D, removed;" but then there were occasions, — not frequent, I agree, — but there were occasions, as you will see might naturally happen, when the President, perhaps, had not had time to select a person whom he would nominate, and when he could not trust the officer then in possession of the office to continue in it, when it was necessary for him by a special order to remove him from the office, wholly independent of any nomination sent in to the Senate. Let me bring before your consideration for a moment a very striking case which happened recently enough to be within the knowledge of many of you. We were on the eve of a civil war: the War Department was in the hands of a man who was disloyal and unfaithful to his trust. His chief clerk, who on his removal or resignation would come into the place, was believed to be in the same category with his master. Under those circumstances, the President of the United States said to

Mr. Floyd, "I must have possession of this office;" and Mr. Floyd had too much good sense or good manners, or something else, to do any thing but resign; and instantly the President put into the place General Holt, the Postmaster-General of the United States at the time, without the delay of an hour. It was a time when a delay of twenty-four hours might have been of vast practical consequence to the country. There are classes of cases arising in all the departments of that character followed by that action; and we shall bring before you evidence showing what those cases have been, so that it will appear that so long as officers held at the pleasure of the President, and wholly independent of the advice which he might receive in regard to their removal from the Senate,—so long, whenever there was an occasion, the President used the power, whether the Senate was in session or not.

I have now gone over, senators, the considerations which seem to me to be applicable to the tenure-of-office bill, and to this allegation which is made that the President knowingly violated the Constitution of the United States in the order for the removal of Mr. Stanton from office while the Senate was in session; and the counsel for the President feel that it is not essential to his vindication from this charge to go further upon this subject. Nevertheless, there is a broader view upon this matter, which is an actual part of the case—and it is due to the President it should be brought before you—that I now propose to open to your consideration.

The Constitution requires the President to take care that the laws be faithfully executed. It also requires of him, as a qualification for his office, to swear that he will faithfully execute the laws, and that, to the best of his ability, he will preserve, protect, and defend the Constitution of the United States. I suppose every one will agree that, so long as the President of the United States, in good faith, is endeavoring to take care that the laws be faithfully executed, and in

good faith, and to the best of his ability, is preserving, protecting, and defending the Constitution of the United States, although he may be making mistakes, he is not committing high crimes or misdemeanors.

In the execution of these duties, the President found, for reasons which it is not my province at this time to enter upon, but which will be exhibited to you hereafter, that it was impossible to allow Mr. Stanton to continue to hold the office of one of his advisers, and to be responsible for his conduct in the manner he was required by the Constitution and laws to be responsible, any longer. This was intimated to Mr. Stanton, and did not produce the effect which, according to the general judgment of well-informed men, such intimations usually produce. Thereupon, the President first suspended Mr. Stanton, and reported that to the Senate. Certain proceedings took place, which will be adverted to more particularly presently. They resulted in the return of Mr. Stanton to the occupation by him of this office. Then it became necessary for the President to consider, first, whether this tenure-of-office law applied to the case of Mr. Stanton; secondly, if it did apply to the case of Mr. Stanton, whether the law itself was the law of the land, or was merely inoperative because it exceeded the constitutional power of the legislature.

I am aware that it is asserted to be the civil and moral duty of all men to obey those laws which have been passed through all the forms of legislation until they shall have been decreed by judicial authority not to be binding; but this is too broad a statement of the civil and moral duty incumbent either upon private citizens or public officers. If this is the measure of duty, there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it. I submit to senators that not only is there no such rule of civil or moral duty, but that it may be and has been a high and patriotic duty of a citizen to

raise a question whether a law is within the Constitution of the country. Will any man question the patriotism or the propriety of John Hampden's act, when he brought the question whether "ship money" was within the Constitution of England before the courts of England? Not only is there no such rule incumbent upon private citizens which forbids them to raise such questions, but, let me repeat, there may be, as there not unfrequently have been, instances in which the highest patriotism and the purest civil and moral duty require it to be done. Let me ask any of you, if you were a trustee for the rights of third persons, and those rights of third persons, which they could not defend themselves by reason, perhaps, of sex or age, should be attacked by an unconstitutional law, should you not deem it to be your sacred duty to resist it, and have the question tried? And if a private trustee may be subject to such a duty, and impelled by it to such action, how is it possible to maintain that he who is a trustee for the people of powers confided to him for their protection, for their security, for their benefit, may not in that character of trustee defend what has thus been confided to him?

Do not let me be misunderstood on this subject. I am not intending to advance upon or occupy any extreme ground, because no such extreme ground has been advanced upon or occupied by the President of the United States. He is to take care that the laws are faithfully executed. When a law has been passed through the forms of legislation, either with his assent or without his assent, it is his duty to see that that law is faithfully executed, so long as nothing is required of him but ministerial action. He is not to erect himself into a judicial court, and decide that the law is unconstitutional, and that therefore he will not execute it; for, if that were done, manifestly there never could be a judicial decision. He would not only veto a law, but he would refuse all action under the law after it had been passed, and thus prevent any judicial decision from being

made. He asserts no such power. He has no such idea of his duty. His idea of his duty is that, if a law is passed over his veto which he believes to be unconstitutional, and that law affects the interests of third persons, those whose interests are affected must take care of them, vindicate them, raise questions concerning them, if they should be so advised. If such a law affects the general and public interests of the people, the people must take care at the polls that it is remedied in a constitutional way.

But when, senators, a question arises whether a particular law has cut off a power confided to him by the people, through the Constitution, and he alone can raise that question, and he alone can cause a judicial decision to come between the two branches of the Government to say which of them is right; and after due deliberation, with the advice of those who are his proper advisers, he settles down firmly upon the opinion that such is the character of the law, it remains to be decided by you whether there is any violation of his duty when he takes the needful steps to raise that question and have it peacefully decided.

Where shall the line be drawn? Suppose a law should provide that the President of the United States should not make a treaty with England or with any other country. It would be a plain infraction of his constitutional power; and, if an occasion arose when such a treaty was in his judgment expedient and necessary, it would be his duty to make it; and the fact that it should be declared to be a high misdemeanor, if he made it, would no more relieve him from the responsibility of acting through the fear of that law than he would be relieved of that responsibility by a bribe not to act.

Suppose a law that he shall not be Commander-in-chief in part or in whole,—a plain case, I will suppose, of an infraction of that provision of the Constitution which has confided to him that command; the Constitution intending that the head of all the military power of the country

should be a civil magistrate, to the end that the law may always be superior to arms. Suppose he should resist a statute of that kind in the manner I have spoken of by bringing it to a judicial decision?

It may be said these are plain cases of express infractions of the Constitution; but what is the difference between a power conferred upon the President by the express words of the Constitution and a power conferred upon the President by a clear and sufficient implication in the Constitution? Where does the power to make banks come from? Where does the power come from to limit Congress in assigning original jurisdiction to the Supreme Court of the United States,—one of the cases referred to the other day? Where do a multitude of powers upon which Congress acts come from in the Constitution except by fair implications? Whence do you derive the power, while you are limiting the tenure of office, to confer on the Senate the right to prevent removals without their consent? Is that expressly given in the Constitution, or is it an implication which is made from some of its provisions?

I submit it is impossible to draw any line of duty for the President, simply because a power is derived from an implication in the Constitution instead of from an express provision. One thing unquestionably is to be expected of the President on all such occasions: that is, that he should carefully consider the question; that he should ascertain that it necessarily arises; that he should be of opinion that it is necessary to the public service that it should be decided; that he should take all competent and proper advice on the subject. When he has done all this, if he finds that he cannot allow the law to operate in the particular case without abandoning a power which he believes has been confided to him by the people, it is his solemn conviction that it is his duty to assert the power and obtain a judicial decision thereon. And although he does not perceive, nor do his counsel perceive, that it is essential to his defence in

this case to maintain this part of the argument, nevertheless, if this tribunal should be of that opinion, then before this tribunal, before all the people of the United States, and before the civilized world, he asserts the truth of this position.

I am compelled now to ask your attention, quite briefly, however, to some considerations which weighed upon the mind of the President, and led him to the conclusion that this was one of the powers of his office which it was his duty, in the manner I have indicated, to endeavor to preserve.

The question whether the Constitution has lodged the power of removal with the President alone, with the President and Senate, or left it to Congress to be determined at its will in fixing the tenure of offices, was, as all senators know, debated in 1789 with surpassing ability and knowledge of the frame and necessities of our Government.

Now, it is a rule long settled, existing, I suppose, in all civilized countries, certainly in every system of law that I have any acquaintance with, that a contemporary exposition of a law made by those who were competent to give it a construction, is of very great weight; and that when such contemporary exposition has been made of a law, and it has been followed by an actual and practical construction in accordance with that contemporary exposition, continued during a long period of time and applied to great numbers of cases, it is afterward too late to call in question the correctness of such a construction. The rule is laid down, in the quaint language of Lord Coke, in this form:—

Great regard ought, in construing a law, to be paid to the construction which the sages who lived about the time or soon after it was made put upon it, because they were best able to judge of the intention of the makers at the time when the law was made. “*Contemporanea expositio est fortissima in lege.*”

I desire to bring before the Senate in this connection, inasmuch as I think the subject has been frequently misun-

derstood, the form taken by that debate of 1789, and the result which was attained. In order to do so, and at the same time to avoid fatiguing your attention by looking minutely into the debate itself, I beg leave to read a passage from Chief Justice Marshall's Life of Washington, where he has summed up the whole. The writer says, on page 162 of the second volume of the Philadelphia edition:—

After an ardent discussion, which consumed several days, the committee divided, and the amendment was negatived by a majority of thirty-four to twenty. The opinion thus expressed by the House of Representatives did not explicitly convey their sense of the Constitution. Indeed, the express grant of the power to the President rather implied a right in the legislature to give or withhold it at their discretion. To obviate any misunderstanding of the principle on which the question had been decided, Mr. Benson moved in the House, when the report of the Committee of the Whole was taken up, to amend the second clause in the bill so as clearly to imply the power of removal to be solely in the President. He gave notice that, if he should succeed in this, he would move to strike out the words which had been the subject of debate. If those words continued, he said, the power of removal by the President might hereafter appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability; when he was well satisfied in his own mind that it was by fair construction fixed in the Constitution. The motion was seconded by Mr. Madison, and both amendments were adopted. As the bill passed into a law, it has ever been considered as a full expression of the sense of the legislature on this important part of the American Constitution.

Some allusion has been made to the fact that this law was passed in the Senate only by the casting vote of the Vice-President; and upon that subject I beg leave to refer to the Life of Mr. Adams by his grandson (vol. i. pp. 448-450). He here gives an account—so far as could be ascertained from the papers of President Adams—of what that debate was, and finally terminates the subject in this way:—

These reasons [that is, the reasons of Vice-President Adams] were not committed to paper, however, and can therefore never be known. But in their soundness it is certain that he never had the shadow of a doubt.

I desire leave, also, to refer on this subject to the first volume of Story's Commentaries on the Constitution, section four hundred and eight, in support of the rule of interpretation which I have stated to the Senate. It will there be found that it is stated by the learned commentator that a contemporaneous construction of the Constitution, made under certain circumstances, which he describes, is of very great weight in determining its meaning. He says:—

After all, the most unexceptionable source of collateral interpretation is from the practical exposition of the Government itself, in its various departments, upon particular questions discussed and settled upon their own single merits. These approach the nearest in their own nature to judicial expositions, and have the same general recommendation that belongs to the latter. They are decided upon solid argument *pro re nata*, upon a doubt raised, upon a *lis mota*, upon a deep sense of their importance and difficulty, in the face of the nation, with a view to present action in the midst of jealous interests, and by men capable of urging or repelling the grounds of argument from their exquisite genius, their comprehensive learning, or their deep meditation upon the absorbing topic. How light, compared with these means of instruction, are the private lucubrations of the closet or the retired speculations of ingenious minds, intent on theory or general views, and unused to encounter a practical difficulty at every step!

On comparing the decision made in 1789 with the tests which are here suggested by the learned commentator, it will be found, in the first place, that the precise question was under discussion; secondly, that there was a deep sense of its importance, for it was seen that the decision was not to affect a few cases lying here and there in the course of the Government, but that it would enter deeply into its practical and daily administration; and, in the next place, the

determination was, so far as such determination could be entertained, thereby to fix a system for the future; and, in the last place, the men who participated in it must be admitted to have been exceedingly well qualified for their work.

There is another rule to be added to this, which is also one of very frequent application; and it is that a long-continued practical application of a decision of this character by those to whom the execution of a law is confided is of decisive weight. To borrow again from Lord Coke on this subject, "Optimus legum interpres consuetudo," — "Practice is the best interpreter of law." Now what followed this original decision? From 1789 down to 1867, every President and every Congress participated in and acted under the construction given in 1789. Not only did the Government so conduct, but it was a subject sufficiently discussed among the people to bring to their consideration that such a question had existed, had been started, had been settled in this manner, had been raised again from time to time, and yet, as everybody knows, so far from the people interfering with this decision, so far from ever expressing in any manner their disapprobation of the practice which had grown up under it, not one party nor two parties, but all parties, favored and acted upon this system of government.

Mr. EDMUNDS (at 2 o'clock and 25 minutes P. M.). — Mr. President, if agreeable to the honorable counsel, I will move that the Senate take a recess for fifteen minutes.

The motion was agreed to.

The Chief Justice resumed the chair at 15 minutes to 3 o'clock, and called the Senate to order.

Mr. MORRILL, of Vermont (after a pause). I move that the Senate do now adjourn, — I see that most of the senators are away, — and on that motion I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. CONKLING. What is the motion? I did not hear it.

THE CHIEF JUSTICE. The motion is to adjourn until to-morrow at 12 o'clock, and upon that motion the yeas and nays are ordered.

The question, being taken by yeas and nays, resulted — yeas, 2; nays, 35 — as follows: —

YEAS.— Messrs. McCreery, and Patterson of Tennessee, — 2.

NAYS.— Messrs. Buckalew, Cattell, Chandler, Cole, Conkling, Corbett, Cragin, Davis, Dixon, Doolittle, Drake, Ferry, Fessenden, Frelinghuysen, Grimes, Henderson, Hendricks, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Pomeroy, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Van Winkle, Vickers, Willey, and Yates, — 35.

NOT VOTING.— Messrs. Anthony, Bayard, Cameron, Conness, Edmunds, Fowler, Harlan, Norton, Nye, Patterson of New Hampshire, Ramsey, Saulsbury, Sprague, Trumbull, Wade, Williams, and Wilson, — 17.

So the Senate refused to adjourn.

THE CHIEF JUSTICE. The counsel for the President will proceed with the argument.

Mr. CURTIS. Mr. Chief Justice and Senators, when the Senate adjourned, I was asking attention to the fact that this practical interpretation was put upon the Constitution in 1789, and that it had been continued with the concurrence of the legislative and executive branches of the Government down to 1867, affecting so great a variety of interests, embracing so many offices, so well known, not merely to the members of the Government themselves, but to the people of the country, that it was impossible to doubt that it had received their sanction, as well as the sanction of the executive and the legislative branches of the Government.

This is a subject which has been heretofore examined, and passed upon judicially in very numerous cases. I do not speak now, of course, of judicial decisions of this particular question which is under consideration, whether the Consti-

tution has lodged the power of removal in the President alone, or in the President and Senate, or has left it to be a part of the legislative power; but I speak of the judicial exposition of the effect of such a practical construction of the Constitution of the United States, originated in the way in which this was originated, continued in the way in which this was continued, and sanctioned in the way in which this has been sanctioned.

There was a case that arose soon after the organization of the Government, and which is reported under the name of *Stuart v. Laird*, in 1 Cranch, 299. It was a question concerning the interpretation of the Constitution in relation to the power which the Congress had to assign to the judges of the Supreme Court circuit duties. From that time down to the decision in the case of *Cooley v. The Port Wardens of Philadelphia*, reported in 12 How. 315,—a period of more than half a century,—there has been a series of decisions upon the effect of such a contemporaneous construction of the Constitution, followed by such a practice in accordance with it; and it is now a fixed and settled rule, which I think no lawyer will undertake to controvert, that the effect of such a construction is not merely to give weight to an argument, but to fix an interpretation. And accordingly it will be found, by looking into the books written by those who were conversant with this subject, that they have so considered and received it. I beg leave to refer to the most eminent of all the commentators on American law, and to read a line or two from Chancellor Kent's Lectures, found in the first volume, page 310, marginal paging. After considering this subject,—and it should be noted in reference to this very learned and experienced jurist considering it in an unfavorable light, because he himself thought that as an original question it had better have been settled the other way, that it would have been more logical, more in conformity with his views of what the practical needs of the Government were, that the Senate should participate with

the President in the power of removal : nevertheless, he sums it all up in these words : —

This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon as of decisive authority in the case. It applies equally to every other officer of the Government appointed by the President and Senate, whose term of duration is not specially declared. It is supported by the weighty reason that the subordinate officers in the executive department ought to hold at the pleasure of the head of that department, because he is invested generally with the executive authority ; and every participation in that authority by the Senate was an exception to the general principle, and ought to be taken strictly. The President is the great responsible officer for the faithful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfil it.

This, I believe, will be found to be a fair expression of the opinions of those who have had occasion to examine this subject in their closets as a matter of speculation.

In this case, however, the President of the United States had to consider not merely the general question where this power was lodged, not merely the effect of this decision made in 1789, and the practice of the Government under it since, but he had to consider a particular law, the provisions of which were before him, and might have an application to the case on which he felt called on to act ; and it is necessary, in order to do justice to the President in reference to this matter, to see what the theory of that law is, and what its operation is or must be, if any, upon the case which he had before him ; namely, the case of Mr. Stanton.

During the debate in 1789 there were three distinct theories held by different persons in the House of Representatives. One was that the Constitution had lodged the power of removal with the President alone ; another was that the Constitution had lodged that power with the President, acting with the advice and consent of the Senate ; the

third was that the Constitution had lodged it nowhere, but had left it to the legislative power, to be acted upon in connection with the prescription of the tenure of office. The last of these theories was at that day held by comparatively few persons. The first two received not only much the greater number of votes, but much the greater weight of reasoning in the course of that debate; so much so, that when this subject came under the consideration of the Supreme Court of the United States, in the case of *Ex parte* Hennan, collaterally only, Mr. Justice Thompson, who delivered the opinion of the court on that occasion, says that it has never been doubted that the Constitution had lodged the power either in the President alone or in the President and Senate,—certainly an inaccuracy; but then it required a very close scrutiny of the debates, and a careful examination of the few individual opinions expressed in that debate, in that direction, to ascertain that it ever had been doubted that, one way or the other, the Constitution settled the question.

Nevertheless, as I understand it,—I may be mistaken in this,—but, as I understand it, it is the theory of this law which the President had before him that both these opinions were wrong: that the Constitution has not lodged the power anywhere; that it has left it as an incident to the legislative power, which incident may be controlled, of course, by the legislature itself, according to its own will; because, as Chief Justice Marshall somewhere remarks (and it is one of those profound remarks which will be found to have been carried by him into many of his decisions), when it comes to a question whether a power exists, the particular mode in which it may be exercised must be left to the will of the body that possesses it; and, therefore, if this be a legislative power, it was very apparent to the President of the United States, as it had been very apparent to Mr. Madison, as was declared by him in the course of his correspondence with Mr. Coles, which is, no doubt, familiar to

senators, that, if this be a legislative power, the legislature may lodge it in the Senate, may retain it in the whole body of Congress, or may give it to the House of Representatives. I repeat, the President had to consider this particular law; and that, as I understand it, is the theory of that law. I do not undertake to say it is an unfounded theory; I do not undertake to say that it may not be maintained successfully; but I do undertake to say that it is one which was originally rejected by the ablest minds that had this subject under consideration in 1789; that, whenever the question has been started since, it has had, to a recent period, very few advocates; and that no fair and candid mind can deny that it is capable of being doubted and disbelieved after examination. It may be the truth, after all; but it is not a truth which shines with such clear and certain light that a man is guilty of a crime because he does not see it.

The President not only had to consider this particular law, but he had to consider its constitutional application to this particular case, supposing the case of Mr. Stanton to be, what I have endeavored to argue it was not, within its terms. Let us assume, then, that his case was within its terms; let us assume that this proviso, in describing the cases of Secretaries, described the case of Mr. Stanton; that Mr. Stanton, having been appointed by President Lincoln in January, 1862, and commissioned to hold during the pleasure of the President, by force of this law acquired a right to hold this office against the will of the President down to April, 1869. Now, there is one thing which has never been doubted under the Constitution,—is incapable of being doubted, allow me to say,—and that is that the President is to make the choice of officers. Whether, having made the choice, and they being inducted into office, they can be removed by him alone, is another question. But to the President alone is confided the power of choice. In the first place, he alone can nominate. When the Senate has advised the nomination, consented to the nomination, he is

not bound to commission the officer. He has a second opportunity for consideration, and acceptance or rejection of the choice he had originally made. On this subject, allow me to read from the opinion of Chief Justice Marshall, in the case of *Marbury v. Madison*, where it is expressed more clearly than I can express it. After enumerating the different clauses of the Constitution which bear upon this subject, he says:—

These are the clauses of the Constitution and laws of the United States which affect this part of the case. They seem to contemplate three distinct operations:—

1. The nomination. This is the sole act of the President, and is completely voluntary.

2. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate.

3. The commission. To grant a commission to a person appointed might perhaps be deemed a duty enjoined by the Constitution. “He shall,” says that instrument, “commission all the officers of the United States.” 1 Cranch, 155.

He then goes into various considerations to show that it is not a duty enjoined by the Constitution; that it is optional with him whether he will commission even after an appointment has been confirmed, and he says:—

The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed. *Ibid.*, 157.

The choice, then, is with the President. The action of the Senate upon that choice is an advisory action only at a particular stage after the nomination, before the appointment or the commission. Now, as I have said before, Mr. Stanton was appointed under the law of 1789, constituting the War Department; and, in accordance with that law, he

was commissioned to hold during the pleasure of the President. President Lincoln had said to the Senate, "I nominate Mr. Stanton to hold the office of Secretary for the Department of War during the pleasure of the President." The Senate had said, "We assent to Mr. Stanton's holding the office of Secretary for the Department of War during the pleasure of the President." What does this tenure-of-office law say, if it operates on the case of Mr. Stanton? It says, Mr. Stanton shall hold office against the will of the President, contrary to the terms of his commission, contrary to the law under which he was appointed, down to the 4th of April, 1869. For this new, fixed, and extended term, where is Mr. Stanton's commission? Who has made the appointment? Who has assented to it? It is a legislative commission; it is a legislative appointment; it is assented to by Congress, acting in its legislative capacity. The President has had no voice in the matter. The Senate, as the advisers of the President, have had no voice in the matter. If he holds at all, he holds by force of legislation, and not by any choice made by the President, or assented to by the Senate. And this was the case, and the only case, which the President had before him, and on which he was called to act.

Now, I ask senators to consider whether, for having formed an opinion that the Constitution of the United States had lodged this power with the President,—an opinion which he shares with every President who has preceded him, with every Congress which has preceded the last; an opinion formed on the grounds which I have imperfectly indicated; an opinion which, when applied to this particular case, raises the difficulties which I have indicated here, arising out of the fact that this law does not pursue either of the opinions which were originally held in this Government, and have occasionally been started and maintained by those who are restless under its administration; an opinion thus supported by the practice of the Govern-

ment from its origin down to his own day,—is he to be impeached for holding that opinion? If not, if he might honestly and properly form such an opinion under the lights which he had, and with the aid of the advice which we shall show you he received, then is he to be impeached for acting upon it to the extent of obtaining a judicial decision whether the executive department of the Government was right in its opinion, or the legislative department was right in its opinion? Strangely enough, as it struck me, the honorable managers themselves say, "No: he is not to be impeached for that." I beg leave to read a passage from the argument of the honorable manager by whom the prosecution was opened:—

If the President had really desired solely to test the constitutionality of the law or his legal right to remove Mr. Stanton, instead of his defiant message to the Senate of the 21st of February, informing them of the removal, but not suggesting this purpose, which is thus shown to be an afterthought, he would have said, in substance: "Gentlemen of the Senate, in order to test the constitutionality of the law entitled 'An Act regulating the tenure of certain civil offices,' which I verily believe to be unconstitutional and void, I have issued an order of removal of E. M. Stanton from the office of Secretary of the Department of War. I felt myself constrained to make this removal, lest Mr. Stanton should answer the information in the nature of a *quo warranto*, which I intend the Attorney-General shall file at an early day, by saying that he holds the office of Secretary of War by the appointment and authority of Mr. Lincoln, which has never been revoked. Anxious that there shall be no collision or disagreement between the several departments of the Government and the Executive, I lay before the Senate this message, that the reasons for my action, as well as the action itself, for the purpose indicated, may meet your concurrence."

Thus far are marks of quotation showing the communication which the President should have obtained from the honorable manager and sent to the Senate, in order to make this matter exactly right. Then follows this:—

Had the Senate received such a message, the representatives of the people might never have deemed it necessary to impeach the President for such an act, to insure the safety of the country, even if they had denied the accuracy of his legal positions.

So it seems that it is, after all, not the removal of Mr. Stanton, but the manner in which the President communicated the fact of that removal to the Senate after it was made. That manner is here called the "defiant message" of the 21st of February. That is a question of taste. I have read the message, as you all have read it. If you can find any thing in it that is not decorous and respectful to this body and to all concerned, your taste will differ from mine. But, whether it be a point of manners well or ill taken, one thing seems to be quite clear: that the President is not impeached here, because he entertained an opinion that this law was unconstitutional; he is not impeached here, because he acted on that opinion and removed Mr. Stanton; but he is impeached here, because the House of Representatives considers that this honorable body was addressed by a "defiant message," when they should have been addressed in the terms which the honorable manager has dictated.

I now come, Mr. Chief Justice and senators, to another topic connected with this matter of the removal of Mr. Stanton and the action of the President under this law. The honorable managers take the ground, among others, that whether upon a true construction of this tenure-of-office act Mr. Stanton be within it, or even if you should believe that the President thought the law unconstitutional, and had a right, if not trammelled in some way, to try that question, still by his own conduct and declarations the President is estopped, as they phrase it. He is not to be permitted here to assert the true interpretation of this law; he is not to be permitted to allege that his purpose was to raise a question concerning its constitutionality; and the reason is that he has done and said certain things. All of

us who have read law-books know that there is in the common law a doctrine called rules of estoppel, founded, undoubtedly, on good reason, although, as they are called from the time of Lord Coke, or even earlier, down to the present day, odious, because they shut out the truth. Nevertheless, there are circumstances when it is proper that the truth should be shut out. What are the circumstances? They are where a question of private right is involved; where on a matter of fact that private right depends, and where one of the parties to the controversy has so conducted himself that he ought not in good conscience to be allowed either to assert or deny that matter of fact.

But did any one ever hear of an estoppel on a matter of law? Did any one ever hear that a party had put himself into such a condition that, when he came into a court of justice even to claim a private right, he could not ask the judge correctly to construe a statute, and insist on the construction when it was arrived at in his favor? Did anybody ever hear, last of all, that a man was convicted of crime by reason of an estoppel, under any system of law that ever prevailed in any civilized State? That the President of the United States should be impeached and removed from office, not by reason of the truth of his case, but because he is estopped from telling it, would be a spectacle for gods and men. Undoubtedly, it would have a place in history which it is not necessary for me to attempt to foreshadow.

There is no matter of fact here. They have themselves put in Mr. Stanton's commission, which shows the date of the commission and the terms of the commission; and that is the whole matter of fact which is involved. The rest is the construction of the tenure-of-office act and the application of it to the case, which they have thus made themselves; and also the construction of the Constitution of the United States, and the abstract public question whether that has lodged the power of removal with the President

alone, or with the President and Senate, or left it to Congress. I respectfully submit, therefore, that the ground is untenable that there can be an estoppel by any conduct of the President, who comes here to assert, not a private right, but a great public right confided to the office by the people, in which, if anybody is estopped, the people will be estopped. The President never could do or say any thing which would put this great public right into that extraordinary predicament.

But what has he done? What are the facts upon which they rely out of which to work this estoppel, as they call it? In the first place, he sent a message to the Senate on the 12th of December, 1867, in which he informed the Senate that he had suspended Mr. Stanton by a certain order, a copy of which he gave; that he had appointed General Grant to exercise the duties of the office *ad interim* by a certain other order, a copy of which he gave; and then he entered into a discussion, in which he showed the existence of this question, whether Mr. Stanton was within the tenure-of-office bill; the existence of the other question, whether this was or was not a constitutional law; and then he invoked the action of the Senate. There was nothing misrepresented. There was nothing concealed which he was bound to state. It is complained of by the honorable managers that he did not tell the Senate that, if their action should be such as to restore Mr. Stanton practically to the possession of the office, he should go to law about it. That is the complaint: that he did not tell that to the Senate. It may have been a possible omission, though I rather think not. I rather think that that good taste which is so prevalent among the managers, and which they so insist upon here, would hardly dictate that the President should have held out to the Senate something which might possibly have been construed into a threat upon that subject. He laid the case before the Senate for their action; and now, forsooth, they say he was too deferential to this law, both

by reason of this conduct of his, and also what he did upon other occasions, to which I shall presently advert.

Senators, there is no inconsistency in the President's position or conduct in reference to this matter. Suppose this case : a party who has a private right in question submits to the same tribunal in the same proceeding these questions : first, I deny the constitutionality of the law under which the right is claimed against me ; second, I assert that the true interpretation of that law will not affect this right which is claimed against me ; third, I insist that, even if it is within the law, I make a case within the law,—is there any inconsistency in that? Is not that done every day, or something analogous to it, in courts of justice? And where was the inconsistency on this occasion? Suppose the President had summed up the message which he sent to the Senate in this way : "Gentlemen of the Senate, I insist, in the first place, that this law is unconstitutional; I insist, in the second place, that Mr. Stanton is not within it; I respectfully submit for your consideration whether, if it be a constitutional law and Mr. Stanton's case be within it, the facts which I present to you do not make such a case that you will not advise me to receive him back into office." Suppose he had summed up in that way, would there have been any inconsistency then? And why is not the substance of that found in this message? Here it is pointed out that the question existed whether the law was unconstitutional; here it is pointed out that the question existed whether Mr. Stanton was within the law; and then the President goes on to submit for the consideration of the Senate — who, he had reason to believe, and did believe, thought the law was constitutional, though he had no reason to believe that they thought Mr. Stanton was within the law — the facts to be acted upon within the law, if the case was there. It seems the President has not only been thus anxious to avoid a collision with this law: he has not only on this occasion taken this means to avoid it, but it seems

that he has actually in some particulars obeyed the law; he has made changes in the commissions, or rather they have been made in the departments, and, as he has signed the commissions, I suppose they must be taken, although his attention does not appear to have been called to the subject at all, to have been made with his sanction, just so far, and because he sanctions that which is done by his secretaries, if he does not interfere actively to prevent it.

He has done not merely this, but he has also in several cases — four cases: three collectors and one consul, I think they are — sent into the Senate notice of suspension, notice that he had acted under this law, and suspended these officers. This objection proceeds upon an entire misapprehension of the position of the President and of the views which he has of his own duty. It assumes that, because when the emergency comes, as it did come in the case of Mr. Stanton, when he must act or else abandon a power which he finds in the particular instance it is necessary for him to insist upon, in order to carry on the Government, — that because he holds that opinion, he must run a muck against the law, and take every possible opportunity to give it a blow, if he can. He holds no such opinion.

So long as it is a question of administrative duty merely, he holds that he is bound to obey the law. It is only when the emergency arises, when the question is put to him so that he must answer it: "Can you carry on this department of the Government any longer in this way?" "No." "Have you power to carry it on as the public service demands?" "I believe I have." Then comes the question how he shall act. But whether a consul is to be suspended or removed, whether a defaulting collector is to be suspended or removed, does not involve the execution of the great powers of the Government. It may be carried on: he may be of opinion with less advantage, he may be of opinion not in accordance with the requirements of the Constitution, but it may be carried on without serious em-

barrassment or difficulty. Until that question is settled, he does not find it necessary to make it,—settled in some way, by some person who has an interest to raise and have it settled.

I wish to observe also (the correctness of which observation I think the Senate will agree with) that these changes which have been made in the forms of the commissions really have nothing to do with this subject; for instance, the change is made in the Department of State, "subject to the conditions prescribed by law." That is the tenure on which I think all commissions should originally have run, and ought to continue to run. It is general enough to embrace all. If it is a condition prescribed by law that the Senate must consent to the removal of the incumbent before he is rightfully out of office, it covers that case. If the tenure-of-office bill be not a law of the land because it is not in accordance with the Constitution, it covers that case. It covers every case necessarily from its terms; for every officer does, and should, and must hold subject to the conditions prescribed by law,—not necessarily a law of Congress, but a law of the land,—the Constitution being supreme in that particular.

There is another observation, also; and that is that the change that was made in the Department of the Treasury—"until a successor be appointed and qualified"—has manifestly nothing whatever to do with the subject of removal. Whether the power of removal be vested in the President alone, or vested in the President by and with the advice and consent of the Senate, this clause does not touch it. It is just as inconsistent with removal by the President with the consent of the Senate as it is inconsistent with the removal by the President alone. In other words, it is the general tenure of the office which is described, according to which the officer is to continue to hold; but he and all other officers hold subject to some power of removal vested somewhere, and this change which has been made in the commission

does not declare where it is vested, nor has it any influence on the question in whom it is vested.

I wish to add to this, that there is nothing, so far as I see, on this subject of estoppel, growing out of the action of the President, either in sending the message to the Senate of the twelfth of December, or in the changes in the commissions, or in his sending to the Senate notices of suspensions of different officers, which has any bearing whatever upon the tenure-of-office act as affecting the case of Mr. Stanton. That is a case that stands by itself. The law may be a constitutional law; it may not only be a law under which the President has acted in this instance, but under which he is bound to act, and is willing to act, if you please, in every instance: still, if Mr. Stanton is not within that law, the case remains as it was originally presented; and that case is that, not being within that law, the first article is entirely without foundation.

I now, Mr. Chief Justice, have arrived at a point in my argument when, if it be within the pleasure of the Senate to allow me to suspend it, it will be a boon to me to do so. I am unaccustomed to speak in so large a room, and it is fatiguing to me. Still, I would not trespass at all upon the wishes of the Senate, if they desire me to proceed further.

Mr. JOHNSON. I move that the court adjourn until to-morrow at twelve o'clock.

The motion was agreed to; and the Senate, sitting for the trial of the impeachment, adjourned.

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FRIDAY, April 10, 1868.

The Chief Justice of the United States entered the Senate Chamber at 12 o'clock, and took the chair.

The usual proclamation having been made by the Sergeant-at-arms,—

The managers of the impeachment on the part of the

House of Representatives appeared, and took the seats assigned them.

The counsel for the respondent also appeared, and took their seats.

The presence of the House of Representatives was next announced; and the members of the House, as in Committee of the Whole, headed by Mr. E. B. Washburne, the Chairman of that Committee, and accompanied by the Speaker and Clerk, entered the Senate Chamber, and were conducted to the seats provided for them.

THE CHIEF JUSTICE. The Secretary will read the minutes of the last day's proceedings.

The Secretary read the journal of yesterday's proceedings of the Senate sitting for the trial of the impeachment.

THE CHIEF JUSTICE. Senators will please to give their attention. The counsel for the President will proceed with the argument.

Mr. CURTIS. Mr. Chief Justice and senators, among the points which I accidentally omitted to notice yesterday was one which seems to me of sufficient importance to return, and for a few moments to ask the attention of the Senate, to it. It will best be exhibited by reading from Saturday's proceedings a short passage. In the course of those proceedings, Mr. Manager Butler said:—

It will be seen, therefore, Mr. President and senators, that the President of the United States says in his answer that he suspended Mr. Stanton under the Constitution, indefinitely and at his pleasure. I propose, now, unless it be objected to, to show that that is false under his own hand; and I have his letter to that effect, which, if there is no objection, I will read, the signature of which was identified by C. E. Creecy.

Then followed the reading of the letter, which was this:—

EXECUTIVE MANSION,  
WASHINGTON, D. C., Aug. 14, 1867.

SIR,— In compliance with the requirements of the eighth section of the act of Congress of March 2, 1867, entitled "An Act

regulating the tenure of certain civil offices," you are hereby notified that on the 12th instant Hon. Edwin M. Stanton was suspended from office as Secretary of War, and General Ulysses S. Grant authorized and empowered to act as Secretary of War *ad interim*.

I am, sir, very respectfully yours,

ANDREW JOHNSON.

This is the letter which was to show, under the hand of the President, that when he said in his answer he did not suspend Mr. Stanton by virtue of the tenure-of-office act, that statement was a falsehood. Allow me now to read the eighth section of that act:—

That whenever the President shall, without the advice and consent of the Senate, designate, authorize, or employ any person to perform the duties of any office, he shall forthwith notify the Secretary of the Treasury thereof; and it shall be the duty of the Secretary of the Treasury thereupon to communicate such notice to all the proper accounting and disbursing officers of his department.

The Senate will perceive that this section has nothing to do with the suspension of an officer, and no description of what suspensions are to take place; but the purpose of the section is that if in any case the President, without the advice and consent of the Senate, shall under any circumstances designate a third person to perform temporarily the duties of an office, he is to make a report of that designation to the Secretary of the Treasury, and that officer is to give the necessary information of the event to his subordinate officers. The section applies in terms to and includes all cases. It applies to and includes cases of designation on account of sickness or absence or resignation, or any cause of vacancy, whether temporary or permanent, and whether occurring by reason of a suspension or of a removal from office; and, therefore, when the President says to the Secretary of the Treasury, "I give you notice that I have designated General Grant to perform the duties *ad interim* of

Secretary of War," he makes no allusion, by force of that letter, to the manner in which that vacancy has occurred or the authority by which it has been created; and hence, instead of this letter showing, under the President's own hand, that he had stated a falsehood, it has no reference to the subject-matter of the power or the occasion of Mr. Stanton's removal.

Mr. Manager BUTLER. Read the second section, please; the first clause of it.

Mr. CURTIS. What did the manager call for?

Mr. Manager BUTLER. Read the first clause of the second section of the act, which says that in no other case except when he suspends shall he appoint.

Mr. CURTIS. The second section provides:—

That when any officer appointed as aforesaid, excepting judges of the United States courts, shall, during a recess of the Senate, be shown by satisfactory evidence, &c.

The President is allowed to suspend such an officer. Now, the President states in his answer that he did not act under that section.

Mr. Manager BUTLER. That is not reading the section. That is not what I desired.

Mr. CURTIS. I am aware that is not reading the section, Mr. Manager. You need not point that out. It is a very long section, and I do not propose to read it.

Mr. Manager BUTLER. The first half a dozen lines.

Mr. CURTIS. This second section authorizes the President to suspend in cases of crime and other cases which are described in this section. By force of it, the President may suspend an officer. This eighth section applies to all cases of temporary designations and appointments, whether resulting from suspensions under the second section, or whether arising from temporary absence, or sickness or death or resignation: no matter what the cause may be, if for any reason there is a temporary designation of a person

to supply an office *ad interim*, notice is to be given to the Secretary of the Treasury; and therefore I repeat, senators, that the subject-matter of this eighth section, and the letter which the President wrote in consequence of it, have no reference to the question under what authority he suspended Mr. Stanton.

I now ask the attention of the Senate to the second article in the series; and I will begin, as I began before, by stating what the substance of this article is, what allegation it makes, so as to be the subjects of proof; and then the Senate will be prepared to see how far each one of these allegations is supported by what is already in the case, and I shall be enabled to state what we propose to offer by way of proof in respect to each of them. The substantive allegations of this second article are that the delivery of the letter or authority to General Thomas was without authority of law; that it was an intentional violation of the tenure-of-office act; that it was an intentional violation of the Constitution of the United States; that the delivery of this order to General Thomas was made with intent to violate both the act and the Constitution of the United States. That is the substance of the second article. The Senate will at once perceive that if the suspension of Mr. Stanton was not a violation of the tenure-of-office act in point of fact, or, to state it in other terms, if the case of Mr. Stanton is not within the act, then his removal, if he had been removed, could not be a violation of the act.

If his case is not within the act at all, if the act does not apply to the case of Mr. Stanton, of course his removal is not a violation of that act. If Mr. Stanton continued to hold under the commission which he received from President Lincoln, and his tenure continued to be under the act of 1789, and under his only commission, which was at the pleasure of the President, it was no violation of the tenure-of-office act for Mr. Johnson to remove, or attempt to remove, Mr. Stanton; and therefore the Senate will per-

ceive that it is necessary to come back again, to recur under this article, as it will be necessary to recur under the whole of the first eight articles, to the inquiries, first, whether Mr. Stanton's case was within the tenure-of-office act; and, secondly, whether it was so clearly and plainly within that act that it can be attributed to the President as a high misdemeanor that he construed it not to include his case. But suppose the case of Mr. Stanton is within the tenure-of-office act, still the inquiry arises whether what was done in delivering this letter of authority to General Thomas was a violation of that act; and that renders it necessary that I should ask your careful attention to the general subjects-matter of this act, and the particular provisions which are inserted in it in reference to each of those subjects.

Senators will recollect undoubtedly that this law, as it was finally passed, differs from the bill as it was originally introduced. The law relates to two distinct subjects. One is removal from office: the other subject is appointments of a certain character made under certain circumstances to fill offices. It seems that a practice had grown up under the Government that where a person was nominated to the Senate to fill an office, and the Senate either did not act on his nomination during their session or rejected the nomination, after the adjournment of the Senate and in the recess it was considered competent for the President by a temporary commission to appoint that same person to that same office; and that was deemed by many senators — unquestionably by a majority, and I should judge from reading the debates by a large majority of the Senate — to be an abuse of power, not an intentional abuse. But it was a practice which had prevailed under the Government to a very considerable extent. It was not limited to very recent times. It had been supported by the opinions of different Attorneys-General given to different Presidents. But still it was considered by many senators to be a departure from the spirit of the Constitution, and a substantial derogation

from the just power of the Senate in respect to nominations for office. That being so, it will be found on an examination of this law that the first and second sections of the act relate exclusively to removals from office and temporary suspensions in the recess of the Senate; while the third section and several of the following sections, to which I shall ask your particular attention, relate exclusively to this other subject of appointments made to office after the Senate had refused to concur in the nomination of the person appointed. Allow me now to read from the third section:—

That the President shall have power to fill all vacancies which may happen during the recess of the Senate, by reason of death or resignation.

I pause here to remark that this does not include all cases. It does not include any case of the expiration of a commission. It includes simply death and resignation, not cases of the expiration of a commission during the recess of the Senate. Why these were thus omitted I do not know; but it is manifest that the law does not affect to—and in point of fact does not—cover all cases which might arise belonging to this general class to which this section was designed to refer.

The law goes on to say:—

That the President shall have power to fill all vacancies which may happen during the recess of the Senate, by reason of death or resignation, by granting commissions which shall expire at the end of their next session thereafter. And if no appointment, by and with the advice and consent of the Senate, shall be made to such office so vacant or temporarily filled as aforesaid during such next session of the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office.

Here all the described vacancies in office occurring during the recess of the Senate, and the failure to fill those vacancies in accordance with the advice of the Senate, are treated as occasioning an abeyance of such offices. That applies, as I have said, to two classes of cases,—vacancies happening by reason of death or resignation. It does not apply to any other vacancies.

The next section of this law does not relate to this subject of filling offices, but to the subject of removals:—

That nothing in this act contained shall be construed to extend the term of any office the duration of which is limited by law.

The fifth section is:—

That if any person shall, contrary to the provisions of this act, accept any appointment to, or employment in, any office, or shall hold or exercise, or attempt to hold or exercise, any such office or employment, he shall be deemed, and is hereby declared to be, guilty of a high misdemeanor, and, upon trial and conviction thereof, he shall be punished therefor by a fine not exceeding \$10,000, or by imprisonment, &c.

Any person who shall, "contrary to the provisions of this act," accept any appointment. What are the "provisions of this act" in respect to accepting any appointment? They are found in the third section of the act putting certain offices in abeyance under the circumstances which are described in that section. If any person does accept an office which is thus put into abeyance, or any employment or authority in respect to such office, he comes within the penal provisions of the fifth section; but outside of that there is no such thing as accepting an office contrary to the provisions of the act, because the provisions of the act, in respect to filling offices, extend no further than to these cases; and so in the next section it is declared:—

That every removal, appointment, or employment made, had, or exercised contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or

letter of authority for or in respect to any such appointment or employment, shall be deemed, and are hereby declared to be, high misdemeanors, &c.

Here, again, the making of a letter of authority contrary to the provisions of the act can refer only to those cases which the act itself has described, which the act itself has prohibited; and any other cases which are outside of such prohibition, as this case manifestly is, do not come within its provisions.

The stress of this article, however, does not seem to me to depend at all upon this question of the construction of this law, but upon a totally different matter, which I agree should be fairly and carefully considered. The important allegation of the article is that this letter of authority was given to General Thomas, enabling him to perform the duties of Secretary of War *ad interim* without authority of law: that I conceive to be the main inquiry which arises under this article, provided the case of Mr. Stanton and his removal are within the tenure-of-office bill at all.

I wish first to bring to the attention of the Senate the act of 1795, which is found in 1 Statutes at Large, page 415. It is a short act, and I will read the whole of it:—

That in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the Department of War, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancies be filled: provided, that no one vacancy shall be supplied in manner aforesaid for a longer term than six months.

This act, it has been suggested, may have been repealed by the act of Feb. 20, 1863, which is found in 12 Statutes

at Large, page 656. This also is a short act, and I will trespass on the patience of the Senate by reading it:—

That in case of the death, resignation, absence from the seat of government, or sickness of the head of any executive department of the Government, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize the head of any other executive department, or other officer in either of said departments whose appointment is vested in the President, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease: provided, that no one vacancy shall be supplied in manner aforesaid for a longer term than six months.

These acts, as the Senate will perceive, although they may be said in some sense to relate to the same general subject-matter, contain very different provisions, and the later law contains no express repeal of the other. If, therefore, the later law operates as a repeal, it is only as a repeal by implication. It says in terms that "all acts and parts of acts inconsistent with this act are hereby repealed." That a general principle of law would say, if the statute did not speak those words. The addition of those words adds nothing to its repealing power. The same inquiry arises under them that would arise if they did not exist; namely, how far is this later law inconsistent with the provisions of the earlier law?

There are certain rules which I shall not fatigue the Senate by citing cases to prove, because every lawyer will recognize them as settled rules upon this subject.

In the first place, there is a rule that repeals by implication are not favored by the courts. This is, as I understand it, because the courts act on the assumption or the principle that, if the legislature really intended to repeal the law, they would have said so; not that they necessarily must say so,

because there are repeals by implication: but the presumption is that, if the legislature entertained a clear and fixed purpose to repeal a former law, they would be likely at least to have said so; and, therefore, the rule is a settled one that repeals by implication are not favored by the courts. Another rule is that the repugnancy between the two statutes must be clear. It is not enough that under some circumstances one may possibly be repugnant to the other. The repugnancy, as the language of the books is, between the two must be clear; and, if the two laws can stand together, the latter does not impliedly repeal the former. If senators have any desire to recur to the authorities on this subject, they will find a sufficient number of them collected in Sedgwick on Statute Law, page 126.

Now, there is no repugnancy whatsoever between these two laws, that I can perceive. The act of 1795 applies to all vacancies, however created. The act of 1863 applies only to vacancies, temporary or otherwise, occasioned by death and resignation: removals from office, expiration of commissions, are not included. The act of 1795 applies only to vacancies; the act of 1863, to temporary absences or sickness. The subject-matter, therefore, of the laws is different: there is no inconsistency between them; each may stand together and operate upon the cases to which each applies; and, therefore, I submit that, in the strictest view which may ultimately be taken of this subject, it is not practicable to maintain that the later law repealed altogether the act of 1795. But, whether it did or not, I state again what I have had so often occasion to repeat before: is it not a fair question? Is it a crime to be on one side of that question and not on the other? Is it a high misdemeanor to believe that a certain view taken of the repeal of this earlier law by the later one is a sound view? I submit that that would be altogether too stringent a rule, even for the honorable managers themselves to contend for; and they do not, and the House of Representatives does not, contend

for any such rule. Their article alleges as matter of fact that there was a wilful intention on the part of the President to issue this letter to General Thomas without authority of law,—not on mistaken judgment, not upon an opinion which, after due consideration, lawyers might differ about, but by reason of a wilful intention to act without authority; and that, I submit, from the nature of the case, cannot be made out.

The next allegation in this article to which I desire to invite the attention of the Senate is that the giving of this letter to General Thomas during the session of the Senate was a violation of the Constitution of the United States. That will require your attentive consideration. The Constitution, as you are well aware, has provided for two modes of filling offices. The one is by temporary commissions, during the recess of the Senate, when the vacancy happens in the recess: the other is by appointment with the advice and consent of the Senate, followed by a commission from the President. But it very early became apparent to those who administered the government that cases must occur to which neither of those modes dictated by the Constitution would be applicable, but which must be provided for,—cases of temporary absence of the head of a department, the business of which, especially during the session of Congress, must, for the public interest, continue to be administered; cases of sickness; cases of resignation or removal,—for the power of removal, at any rate in that day, was held to be in the President; cases of resignation or removal in reference to which the President was not, owing to the suddenness of the occurrence, in a condition immediately to make a nomination to fill the office, or even to issue a commission to fill the office, if such vacancy occurred in vacation; and therefore it became necessary by legislation to supply these administrative defects which existed and were not provided for by the Constitution. And accordingly, beginning in 1792, there will be found to be a series of acts on this sub-

ject of filling vacancies by temporary or *ad interim* authority; not appointments, not filling vacancies in offices by a commission in the recess of the Senate, nor by a commission signed by the President in consequence of the advice and consent of the Senate, but a mode of designating a particular person to perform temporarily the duties of some particular office, which otherwise, before the office can be filled in accordance with the Constitution, would remain unperformed. These acts are: one of May 8, 1792, sect. 8 (1 Statutes at Large, p. 281); Feb. 17, 1795 (1 Statutes at Large, p. 415); and, last, in Feb. 20, 1863 (12 Statutes at Large, p. 656).

The Senate will observe what particular difficulty these laws were designed to meet. This difficulty was the occurrence of some sudden vacancy in office, or some sudden inability to perform the duties of an office; and the intention of each of these laws was, each being applied to some particular class of cases, to make provision that notwithstanding there was a vacancy in the office, or notwithstanding there was a temporary disability in the officer without a vacancy, still the duties of the office should be temporarily discharged. That was the purpose of these laws. It is entirely evident that these temporary vacancies are just as liable to occur during the session of the Senate as during the recess of the Senate; that it is just as necessary to have a set of legislative provisions to enable the President to carry on the public service in case of these vacancies and disabilities during the session of the Senate as during the recess of the Senate; and, accordingly, it will be found, by looking into these laws, that they make no distinction between the sessions of the Senate and the recesses of the Senate in reference to these temporary authorities. "Whenever a vacancy shall occur," is the language of the law,— "whenever there shall be a death or a resignation or an absence or a sickness." The law applies when the event occurs that the law contemplates as an emergency; and the particular time when it occurs is

of no consequence in itself, and is deemed by the law of no consequence. In accordance with this view, senators, has been the uniform and settled and frequent practice of the Government from its very earliest date, as I am instructed we shall prove, not in any one or two or few instances, but in great numbers of instances. That has been the practical construction put upon these laws from the time when the earliest law was passed, in 1792; and it has continued down to this day.

The honorable managers themselves read a list a few days since of temporary appointments, during the session of the Senate, of heads of departments, which amounted in number, if I counted them accurately, to upward of thirty; and, if you add to these the cases of officers below the heads of departments, the number will be found, of course, to be much increased; and, in the course of exhibiting this evidence, it will be found that, although the instances are not numerous,—for they are not very likely to occur in practice,—yet instances have occurred on all-fours with the one which is now before the Senate, where there has been a removal or a suspension of an officer,—sometimes one and sometimes the other,—and the designation of a person has been made at the same time temporarily to discharge the duties of that office.

The Senate will see that in practice such things must naturally occur. Take the case, for instance, of Mr. Floyd, which I alluded to yesterday. Mr. Floyd went out of office. His chief clerk was a person believed to be in sympathy with him and under his control. If the third section of the act of 1789 was allowed to operate, the control of the office went into the hands of that clerk. The Senate was in session. The public safety did not permit the War Department to be left in that predicament for one hour, if it could be avoided; and President Buchanan sent down to the Post Office Department, and brought the Postmaster-General to the War Department, and put it in his charge.

There was then in this body a sufficient number of persons to look after that matter. They felt an interest in it, and consequently they passed a resolve inquiring of President Buchanan by what authority he had made an appointment of a person to take charge of the War Department without their consent, without a nomination to them, and their advising and consenting to it, to which a message was sent in answer containing the facts on this subject, and showing to the Senate of that day the propriety, the necessity, and the long-continued practice under which this authority was exercised by him, and giving a schedule running through the time of General Jackson and his two immediate successors, I think, showing great numbers of *ad interim* appointments of this character, and to those, as I have said, we shall add a very considerable number of others.

I submit, then, that there can be no ground whatever for the allegation that this *ad interim* appointment was a violation of the Constitution of the United States. The legislation of Congress is a sufficient answer to that charge.

I pass, therefore, to the next article which I wish to consider, and that is not the next in number, but the eighth ; and I take it in this order, because the eighth article, as I have analyzed it, differs from the second only in one particular ; and therefore, taking that in connection with the second, of which I have just been speaking, it will be necessary for me to say but a very few words concerning it.

It charges an attempt unlawfully to control the appropriations made by Congress for the military service, and that is all there is in it except what there is in the second article.

Upon that, certainly, at this stage of the case, I do not deem it necessary to make any observations. The Senate will remember the offer of proof on the part of the managers designed, as was stated, to connect the President of the United States, through his private secretary, with the treasury, and thus enable him to use unlawfully appropria-

tions made for the military service. The Senate will recollect the fate of that offer, and that the evidence was not received; and, therefore, it seems to me quite unnecessary for me to pause to comment any further upon this eighth article.

I advance to the third article, and here the allegations are that the President appointed General Thomas; second, that he did this without the advice and consent of the Senate; third, that he did it when no vacancy had happened in the recess of the Senate; fourth, that he did it when there was no vacancy at the time of the appointment; and, fifth, that he committed a high misdemeanor by thus intentionally violating the Constitution of the United States.

I desire to say a word or two upon each of these points; and, first, we deny that he ever appointed General Thomas to an office. An appointment can be made to an office only by the advice and consent of the Senate, and through a commission signed by the President, and bearing the great seal of the Government. That is the only mode in which an appointment can be made. The President, as I have said, may temporarily commission officers when vacancies occur during the recess of the Senate. That is not an appointment. It is not so termed in the Constitution. A clear distinction is drawn between the two. The President also may, under the acts of 1795 and 1863, designate persons who shall temporarily exercise the authority and perform the duties of a certain office when there is a vacancy; but that is not an appointment. The office is not filled by such a designation. Now, all which the President did was to issue a letter of authority to General Thomas, authorizing him *ad interim* to perform the duties of Secretary of War. In no sense was this an appointment.

It is said it was made without the advice and consent of the Senate. Certainly it was. How can the advice and consent of the Senate be obtained to an *ad interim* authority of this kind under any of these acts of Congress? It is

not an appointment that is in view. It is to supply temporarily a defect in the administrative machinery of the Government. If he had gone to the Senate for their advice and consent, he must have gone on a nomination made by him of General Thomas to this office,—a thing he never intended to do, and never made any attempt to carry into effect.

It is said no vacancy happened in the recess. That I have already considered. Temporary appointments are not limited to the temporary supply of vacancies happening in the recess of the Senate, as I have already endeavored to show.

It is said there was no vacancy at the time the act was done. That is begging the question. If Mr. Stanton's case was not within the tenure-of-office act; if, as I have so often repeated, he held under the act of 1789, and at the pleasure of the President, the moment he received that order which General Thomas carried to him, there was a vacancy in point of law, however he may have refused to perform his duty and prevented a vacancy from occurring in point of fact. But the Senate will perceive these two letters were to be delivered to General Thomas at the same time. One of them is an order to Mr. Stanton to vacate the office: the other is a direction to General Thomas to take possession, when Mr. Stanton obeys the order thus given. Now, may not the President of the United States issue a letter of authority in contemplation that a vacancy is about to occur? Is he bound to take a technical view of this subject, and have the order creating the vacancy first sent and delivered, and then sit down at his table and sign the letter of authority afterward? If he expects a vacancy, if he has done an act which in his judgment is sufficient to create a vacancy, may he not, in contemplation that that vacancy is to happen, sign the necessary paper to give the temporary authority to carry on the duties of the office?

Last of all, it is said he committed a high misdemeanor

by intentionally violating the Constitution of the United States when he gave General Thomas this letter of authority. If I have been successful in the argument I have already addressed to you, you will be of opinion that in point of fact there was no violation of the Constitution of the United States by delivering this letter of authority, because the Constitution of the United States makes no provision on the subject of these temporary authorities, and the law of Congress has made provision equally applicable to the recess of the Senate and to its session.

Here, also, I beg leave to remind the Senate that if Mr. Stanton's case does not fall within the tenure-of-office act, if the order which the President gave to him to vacate the office was a lawful order and one which he was bound to obey, every thing which is contained in this article, as well as in the preceding articles, fails. It is impossible, I submit, for the honorable managers to construct a case of an intention on the part of the President to violate the Constitution of the United States, out of any thing which he did in reference to the appointment of General Thomas, provided the order to Mr. Stanton was a lawful order, and Mr. Stanton was bound to obey it.

I advance now, senators, to a different class of articles ; and they may properly enough, I suppose, be called the conspiracy articles, because they rest upon charges of conspiracy between the President and General Thomas. There are four of them,—the fourth, fifth, sixth, and seventh in number as they stand. The fourth and the sixth are framed under the act of July 31, 1861, which is found in 12 Statutes at Large, page 284. The fifth and seventh are framed under no act of Congress. They allege an unlawful conspiracy, but they refer to no law by which the acts charged are made unlawful. The acts charged are called unlawful, but there is no law referred to and no case made by the articles within any law of the United States that is known to the President's counsel. I shall treat these arti-

cles, therefore, the fourth and sixth together, and the fifth and seventh together, because I think they belong in that order. In the first place, let me consider the fourth and sixth, which charge a conspiracy within this act which I have just mentioned. It is necessary for me to read the substance of this law, in order that you may see whether it can have any possible application to this case. It was passed on the 31st of July, 1861, as a war measure, and is entitled "An Act to define and punish certain conspiracies." It provides —

That if two or more persons within any State or Territory of the United States shall conspire together to overthrow or to put down or to destroy by force the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States, or by force, or intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States.

These are the descriptions of the offences. The fourth and sixth articles contain allegations that the President and General Thomas conspired together, by force, intimidation, and threats, to prevent Mr. Stanton from continuing to hold the office of Secretary for the Department of War; and also that they conspired together by force to obtain possession of property belonging to the United States. These are the two articles which I suppose are designed to be drawn under this act; and these are the allegations which are intended to bring the articles within it.

Now, it does seem to me that the attempt to wrest this law to any bearing whatsoever upon this prosecution is one of the extraordinary things which the case contains. In the first place so far from having been designed to apply to the President of the United States, or to any act he might do

in the course of the execution of what he believed to be his duty, it does not apply to any man or any thing within the District of Columbia at all.

If two or more persons within any State or Territory of the United States.

Not within the District of Columbia. This is a highly penal law, and an indictment found in the very words of this act charging things to have been done in the District of Columbia and returned into the proper court of this District, I will undertake to say, would not bear a general demurrer, because there is locality given to those things made penal by this act of Congress. It is made applicable to certain portions of the country, but not made applicable to the District of Columbia.

But not to dwell upon that technical view of the matter, and on which we should not choose to stand, let us see what is this case. The President of the United States is of opinion that Mr. Stanton holds the office of Secretary for the Department of War at his pleasure. He thinks so, first, because he believes the case of Mr. Stanton is not provided for in the tenure-of-office act, and no tenure of office is secured to him. He thinks so, secondly, because he believes that it would be judicially decided, if the question could be raised, that a law depriving the President of the power of removing such an officer at his pleasure is not a constitutional law. He is of opinion that in this case he cannot allow this officer to continue to act as his adviser, and as his agent to execute the laws, if he has lawful power to remove him; and under these circumstances he gives this order to General Thomas.

I do not view this letter of authority to General Thomas as a purely military order. The service which General Thomas was invoked for is a civil service, but at the same time senators will perceive that the person who gave the order is the Commander-in-chief of the army; that the per-

son to whom it was given is the Adjutant-General of the army ; that the subject-matter to which the order relates is the performance of services essential to carry on the military service ; and, therefore, when such an order was given by the Commander-in-chief to the Adjutant-General respecting a subject of this kind, is it too much to say that there was invoked that spirit of military obedience which constitutes the strength of the service ? Not that it was a purely military order, not that General Thomas would have been subject to a court-martial for disobeying it, but that as a faithful Adjutant-General of the army of the United States, interested personally and professionally and patriotically to have the duties of the office of Secretary for the Department of War performed in a temporary vacancy, was it not his duty to accept the appointment, unless he saw and knew that it was unlawful to accept it ? I do not know how, in fact, he personally considered it : there has been no proof given on the subject ; but I have always assumed — I think senators will assume — that when the distinguished General of the army of the United States, on a previous occasion, accepted a similar appointment, it was under views of propriety and duty such as those which I have now been speaking of ; and how and why is there to be attributed to General Thomas, as a co-conspirator, the guilty intent of designing to overthrow the laws of his country, when a fair and just view of his conduct would leave him entirely without reproach ?

And when you come, senators, to the other co-conspirator, the President of the United States, is not the case still clearer ? Make it a case of private right, if you please ; put it as strongly as possible against the President, in order to test the question. One of you has a claim to property : it may be a disputed claim ; it is a claim which he believes may prove, when judicially examined, to be sound and good. He says to A. B., "Go to C. D., who is in possession of that property : I give you this order to him to give it up to

you; and, if he gives it up, take possession." Did anybody ever imagine that that was a conspiracy? Does not every lawyer know that, the moment you introduce into any transaction of this kind the element of a claim of right, all criminal elements are purged at once; and that this is always true between man and man, where it is a simple assertion of private right, the parties to which are at liberty either to assert them or forego them, as they please? But this was not such a case: this was a case of public right, of public duty, of public right claimed upon constitutional grounds and upon the interpretation of the law which had been given to it by the law-makers themselves. How can the President of the United States, under such circumstances, be looked upon by anybody, whether he may or may not be guilty or not guilty of other things, as a co-conspirator under this act?

These articles say that the conspiracy between the President and General Thomas was to employ force, threats, intimidation. What they have proved against the President is that he issued these orders, and that alone. Now, on the face of these orders, there is no apology for the assertion that it was the design of the President that anybody at any time should use force, threats, or intimidation. The order is to Mr. Stanton to deliver up possession. The order to General Thomas is to receive possession from Mr. Stanton, when he delivers it up. No force is assigned to him; no authority is given to him to apply for or use any force, threats, or intimidation. There is not only no express authority, but there is no implication of any authority to apply for or obtain or use any thing but the order which was given him to hand to Mr. Stanton; and we shall offer proof, senators, which we think cannot fail to be satisfactory in point of fact, that the President from the first had in view simply and solely to test this question by the law; that, if this was a conspiracy, it was a conspiracy to go to law, and that was the whole of it. We shall show you

what advice the President received on this subject, what views in concert with his advisers he entertained, which, of course, it is not my province now to comment upon: the evidence must first be adduced, then it will be time to consider it.

The other two conspiracy articles will require very little observation from me, because they contain no new allegations of fact which are not in the fourth and sixth articles, which I have already adverted to; and the only distinction between them and the others is that they are not founded upon this conspiracy act of 1861: they simply allege an unlawful conspiracy, and leave the matter there. They do not allege sufficient facts to bring the case within the act of 1861. In other words, they do not allege force, threats, or intimidation. I shall have occasion to remark upon these articles when I come to speak of the tenth article, because these articles, as you perceive, come within that category which the honorable manager announced here at an early period of the trial, — articles which require no law to support them; and when I come to speak of the tenth article, as I shall have occasion to discuss this subject, I wish that my remarks, so far as they may be deemed applicable, should be applied to these fifth and seventh articles which I have thus passed over.

I shall detain the Senate but a moment upon the ninth article, which is the one relating to the conversation with General Emory. The meaning of this article, as I read it, is that the President brought General Emory before himself as Commander-in-chief of the army for the purpose of instructing him to disobey the law, with an intent to induce General Emory to disobey it, and with intent to enable himself unlawfully, and by the use of military force through General Emory, to prevent Mr. Stanton from continuing to hold office. Now I submit that not only does this article fail of proof in its substance as thus detailed, but that it is disproved by the witness whom they have introduced to

support it. In the first place, it appears clearly from General Emory's statement that the President did not bring him there for any purpose connected with this appropriation bill affecting the command of the army, or the orders given to the army. This subject General Emory introduced himself; and, when the conversation was broken off, it was again recurred to by himself asking the President's permission to bring it to his attention. Whatsoever was said upon that subject was said not because the President of the United States had brought the commander of the department of Washington before him for that purpose, but because, having brought him there for another purpose, to which I shall allude in a moment, the commanding general chose himself to introduce that subject, and converse upon it, and obtain the President's views upon it.

In the next place, having his attention called to the act of Congress and to the order under it, the President expressed precisely the same opinion to General Emory that he had previously publicly expressed to Congress itself at the time when the act was sent to him for his signature; and there is found set out in his answer on page 32 of the official report of these proceedings what that opinion was: that he considered that this provision interfered with his constitutional right as the Commander-in-chief of the army; and that is what he said to General Emory. There is not even probable cause to believe that he said it for any other than the natural reason that General Emory had introduced the subject, had asked leave to call his attention to it, and evidently expected and desired that the President should say something on the subject; and, if he said any thing, was he not to tell the truth? That is exactly what he did say: I mean the truth as he apprehended it. It will appear in proof, as I am instructed, that the reason why the President sent for General Emory was not that he might endeavor to seduce that distinguished officer from his allegiance to the laws and the Constitution of his country, but

because he wished to obtain information about military movements, which he was informed, upon authority which he had a right to and was bound to respect, might require his personal attention.

I pass, then, from this article, as being one upon which I ought not to detain the Senate; and I come to the last one, concerning which I shall have much to say, and that is the tenth article, which is all of and concerning the speeches of the President.

In the front of this inquiry, the question presents itself: What are impeachable offences under the Constitution of the United States? Upon this question, learned dissertations have been written and printed. One of them is annexed to the argument of the honorable manager who opened the cause for the prosecution. Another one, on the other side of the question, written by one of the honorable managers themselves, may be found annexed to the proceedings in the House of Representatives upon the occasion of the first attempt to impeach the President. And there have been others written and published by learned jurists touching this subject. I do not propose to vex the ear of the Senate with any of the precedents drawn from the Middle Ages. The framers of our Constitution were quite as familiar with them as the learned authors of these treatises; and the framers of our Constitution, as I conceive, have drawn from them the lesson which I desire the Senate to receive, that these precedents are not fit to govern their conduct on this trial.

In my apprehension, the teachings, the requirements, the prohibitions of the Constitution of the United States prove all that is necessary to be attended to for the purposes of this trial. I propose, therefore, instead of a search through the precedents which were made in the times of the Plantagenets, the Tudors, and the Stuarts, and which have been repeated since, to come nearer home and see what provisions of the Constitution of the United States bear on

this question, and whether they are not sufficient to settle it. If they are, it is quite immaterial what exists elsewhere.

My first position is that, when the Constitution speaks of "treason, bribery, and other high crimes and misdemeanors," it refers to, and includes only, high criminal offences against the United States, made so by some law of the United States existing when the acts complained of were done; and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment.

"Treason" and "bribery." Nobody will doubt that these are here designated high crimes and misdemeanors against the United States, made such by the laws of the United States, which the framers of the Constitution knew must be passed in the nature of the Government they were about to create, because these are offences which strike at the existence of that Government. "Other high crimes and misdemeanors." *Noscitur a sociis.* High crimes and misdemeanors, — so high that they belong in this company with treason and bribery. That is plain on the face of the Constitution, — in the very first step it takes on the subject of impeachment. "High crimes and misdemeanors" against what law? There can be no crime, there can be no misdemeanor without a law, written or unwritten, express or implied. There must be some law, otherwise there is no crime. My interpretation of it is that the language "high crimes and misdemeanors" means "offences against the laws of the United States." Let us see if the Constitution has not said so.

The first clause of the second section of the second article of the Constitution reads thus:—

The President of the United States shall have the power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

"Offences against the United States" would include "cases of impeachment," and they might be pardoned by

the President, if they were not excepted. Then cases of impeachment are, according to the express declaration of the Constitution itself, cases of offences against the United States.

Still, the learned manager says that this is not a court, and that, whatever may be the character of this body, it is bound by no law. Very different was the understanding of the fathers of the Constitution on this subject.

Mr. Manager BUTLER. Will you state where it was I said it was bound by no law?

Mr. STANBERRY. "A law unto itself."

Mr. Manager BUTLER. "No common or statute law," was my language.

Mr. CURTIS. I desire to refer to the sixty-fourth number of the "Federalist," which is found in Dawson's edition, on page 453:—

The remaining powers which the plan of the Convention allots to the Senate, in a distinct capacity, are comprised in their participation with the Executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments, as in the business of appointments the Executive will be the principal agent, the provisions relating to it will most properly be discussed in the examination of that department. We will therefore conclude this head with a view of the judicial character of the Senate.

And then it is discussed. The next position to which I desire the attention of the Senate is that there is enough written in the Constitution to prove that this is a court in which a judicial trial is now being carried on. "The Senate of the United States shall have the sole power to try all impeachments." "When the President is tried, the Chief Justice shall preside." "The trial of all crimes, except in case of impeachment, shall be by jury." This, then, is the trial of a crime. You are triers, presided over by the Chief Justice of the United States in this particular case, and that on the express words of the Constitution. There is also, according to its express words, to be an acquittal or a con-

viction on this trial for a crime. "No person shall be convicted without the concurrence of two thirds of the members present." There is also to be a judgment in case there shall be a conviction.

Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office of honor, trust, or profit under the United States.

Here, then, there is the trial of a crime, a trial by a tribunal designated by the Constitution in place of court and jury ; a conviction, if guilt is proved ; a judgment on that conviction ; a punishment inflicted by the judgment for a crime ; and this on the express terms of the Constitution itself. And yet, say the honorable managers, there is no court to try the crime, and no law by which the act is to be judged. The honorable manager interrupted me to say that he qualified that expression of no law: his expression was, "no common or statute law." Well, when you get out of that field, you are in a limbo, a vacuum, so far as law is concerned, to the best of my knowledge and belief.

I say, then, that it is impossible not to come to the conclusion that the Constitution of the United States has designated impeachable offences as offences against the United States; that it has provided for the trial of those offences ; that it has established a tribunal for the purpose of trying them ; that it has directed the tribunal, in case of conviction, to pronounce a judgment upon the conviction and inflict a punishment. All this being provided for, can it be maintained that this is not a court, or that it is bound by no law ?

But the argument does not rest mainly, I think, upon the provisions of the Constitution concerning impeachment. It is, at any rate, vastly strengthened by the direct prohibitions of the Constitution. "Congress shall pass no bill of attainder or *ex post facto* law." According to that prohibition of the Constitution, if every member of this body, sitting in

its legislative capacity, and every member of the other body, sitting in its legislative capacity, should unite in passing a law to punish an act after the act was done, that law would be a mere nullity. Yet what is claimed by the honorable managers in behalf of members of this body? As a Congress, you cannot create a law to punish these acts, if no law existed at the time they were done; but sitting here as judges, not only after the fact, but while the case is on trial, you may individually, each one of you, create a law by himself to govern the case.

According to this assumption, the same Constitution which has made it a bill of rights of the American citizen, not only as against Congress, but as against the legislature of every State in the Union, that no *ex post facto* law shall be passed, — this same Constitution has erected you into a body and empowered every one of you to say, *Aut inveniam aut faciam*, — “If I cannot find a law, I will make one.” Nay, it has clothed every one of you with imperial power: it has enabled you to say, *Sic volo, sic jubeo, stat pro ratione, voluntas*, — “I am a law unto myself, by which law I shall govern this case.” And, more than that, when each one of you before he took his place here called God to witness that he would administer impartial justice in this case according to the Constitution and the laws, he meant such laws as he might make as he went along. The Constitution, which had prohibited anybody from making such laws, he swore to observe; but he also swore to be governed by his own will: his own individual will was the law which he thus swore to observe; and this special provision of the Constitution, that when the Senate sits in this capacity to try an impeachment the senators shall be on oath, means merely that they shall swear to follow their own individual wills! I respectfully submit, this view cannot consistently and properly be taken of the character of this body, or of the duties and powers incumbent upon it.

Look for a moment, if you please, to the other provision.

The same search into the English precedents, so far from having made our ancestors who framed and adopted the Constitution in love with them, led them to put into the Constitution a positive and absolute prohibition against any bill of attainder. What is a bill of attainder? It is a case before the Parliament where the Parliament make the law for the facts they find. Each legislator—for it is in their legislative capacity they act, not in a judicial one—is, to use the phrase of the honorable managers, “a law unto himself,” and according to his discretion, his views of what is politic or proper under the circumstances, he frames a law to meet the case, and enacts it or votes in its enactment. According to the doctrine now advanced, bills of attainder are not prohibited by this Constitution: they are only slightly modified. It is only necessary for the House of Representatives by a majority to vote an impeachment and send up certain articles and have two thirds of this body vote in favor of conviction, and there is an attainder; and it is done by the same process and depends on identically the same principles as a bill of attainder in the English Parliament. The individual wills of the legislators, instead of the conscientious discharge of the duty of the judges, settle the result.

I submit then, senators, that this view of the honorable managers of the duties and powers of this body cannot be maintained. But the attempt made by the honorable managers to obtain a conviction upon this tenth article is attended with some peculiarities which I think it is the duty of the counsel of the President to advert to. So far as regards the preceding articles, the first eight articles are framed upon allegations that the President broke a law. I suppose the honorable managers do not intend to carry their doctrine so far as to say that, unless you find the President did intentionally break a law, those articles are supported. As to those articles, there is some law unquestionably, the very gist of the charge being that he broke a law. You must

find that the law existed ; you must construe it, and apply it to the case ; you must find his criminal intent wilfully to break the law, before the articles can be supported. But we come now to this tenth article, which depends upon no law at all, but, as I have said, is attended with some extraordinary peculiarities.

The complaint is that the President made speeches against Congress. The true statement here would be much more restricted than that ; for, although in those speeches the President used the word "Congress," undoubtedly he did not mean the entire constitutional body organized under the Constitution of the United States : he meant the dominant majority in Congress. Everybody so understood it : everybody must so understand it. But the complaint is that he made speeches against those who governed in Congress. Well, who are the grand jury in this case ? One of the parties spoken against. And who are the triers ? The other party spoken against. One would think there was some incongruity in this, some reason for giving pause before taking any very great stride in that direction. The honorable House of Representatives sends its managers here to take notice of what ? That the House of Representatives has erected itself into a school of manners, selecting from its ranks those gentlemen whom it deems most competent by precept and example to teach decorum of speech ; and they desire the judgment of this body whether the President has not been guilty of indecorum, whether he has spoken properly, to use the phrase of the honorable manager. Now, there used to be an old-fashioned notion that, although there might be a difference of taste about oral speeches, and no doubt always has been and always will be many such differences, there was one very important test in reference to them, and that is whether they are true or false ; but it seems that in this case that is no test at all. The honorable manager, in opening the case, finding, I suppose, that it was necessary in some manner to advert to

that subject, has done it in terms which I will read to you :—

The words are not alleged to be either false or defamatory, because it is not within the power of any man, however high his official position, in effect to slander the Congress of the United States, in the ordinary sense of that word, so as to call on Congress to answer as to the trnht of the accusation.

Considering the nature of our Government, considering the experience which we have gone through on this subject, that is a pretty lofty claim. Why, if the Senate please, if you go back to the time of the Plantagenets and seek for precedents there, you will not find so lofty a claim as that. I beg leave to read from two statutes — the first being 3 Edward I., ch. 34 ; and the second, 2 Richard II., ch. 1 — a short passage. The statute 3 Edward I., ch. 34, after the preamble, enacts :—

That from henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people, or the great men of the realm ; and he that doeth so shall be taken and kept in until he hath brought him into court, which was the first author of the tale.

The statute 2 Richard II., c. 1, § 5, enacted with some alterations the previous statute. It commenced thus :—

Of devisors of false news and of horrible and false lies of prelates, dukes, earls, barons, and other nobles and great men of the realm ; and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and of other great officers of the realm.

The great men of the realm in the time of Richard II. were protected only against “horrible and false lies,” and when we arrive in the course of our national experience during the war with France and the administration of Mr. Adams to that attempt to check, not free speech, but free writing, senators will find that, although it applied only to written

libels, it contained an express section that the truth might be given in evidence. That was a law, as senators know, making it penal by written libels to excite the hatred or contempt of the people against Congress among other offences; but the estimate of the elevation of Congress above the people was not so high, but that it was thought proper to allow a defence of the truth to be given in evidence. I beg leave to read from this sedition act a part of one section, and make a reference to another to support the correctness of what I have said. It is found in Statutes at Large, page 596 :—

That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing any false, scandalous, and malicious writing or writings against the Government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said Government, or either House of the said Congress, or the said President, or to bring them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, &c.

Section three provides :—

That if any person shall be prosecuted under this act for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

In contrast with the views expressed here, I desire now to read from the fourth volume of Mr. Madison's Works, pages 542 and 547, passages which, in my judgment, are as masterly as any thing Mr. Madison ever wrote, upon the relations of the Congress of the United States to the people of the United States, in contrast with the relations of the Govern-

ment of Great Britain to the people of that island; and the necessity which the nature of our Government lays us under to preserve freedom of the press and freedom of speech:—

The essential difference between the British Government and the American Constitution will place this subject in the clearest light.

In the British Government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the legislature are only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the executive. Hence it is a principle that the Parliament is unlimited in its power; or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people — such as their Magna Charta, their Bill of Rights, &c. — are not reared against the Parliament, but against the royal prerogative. They are merely legislative precautions against executive usurpations. Under such a government as this, an exemption of the press from previous restraint, by licensers appointed by the king, is all the freedom that can be secured to it.

In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licenses, but from the subsequent penalty of laws.

One other passage, on page 547, which has an extraordinary application to the subject now before you:—

1. The Constitution supposes that the President, the Congress, and each of its houses may not discharge their trusts, either from

defect of judgment or other causes. Hence they are all made responsible to their constituents at the returning periods of election; and the President, who is singly intrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.

2. Should it happen, as the Constitution supposes it may happen, that either of these branches of the Government may not have duly discharged its trust, it is natural and proper that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.

3. Whether it has in any case happened that the proceedings of either or all of those branches evince such a violation of duty as to justify a contempt, a disrepute, or hatred among the people, can only be determined by a free examination thereof, and a free communication among the people thereon.

4. Whenever it may have actually happened that proceedings of this sort are chargeable on all or either of the branches of the Government, it is the duty, as well as right, of intelligent and faithful citizens to discuss and promulge them freely, as well to control them by the censorship of the public opinion as to promote a remedy according to the rules of the Constitution. And it cannot be avoided that those who are to apply the remedy must feel, in some degree, a contempt or hatred against the transgressing party.

These observations of Mr. Madison were made in respect to the freedom of the press. There were two views entertained at the time when the sedition law was passed concerning the power of Congress over this subject. The one view was that, when the Constitution spoke of freedom of the press, it referred to the common-law definition of that freedom. That was the view which Mr. Madison was controverting in one of the passages which I have read to you. The other view was that the common-law definition could not be deemed applicable, and that the freedom provided for by the Constitution, so far as the action of Congress was concerned, was an absolute freedom of the press. But no one ever imagined that freedom of speech, in contradistinction from written libel, could be restrained by a law of Congress; for whether you treat the prohibition in the Con-

stitution as absolute in itself, or whether you refer to the common law for a definition of its limits and meaning, the result will be the same. Under the common law, no man was ever punished criminally for spoken words. If he slandered his neighbor and injured him, he must make good in damages to his neighbor the injury he had done ; but there was no such thing at the common law as an indictment for spoken words. So that this prohibition in the Constitution against any legislation by Congress in restraint of the freedom of speech is necessarily an absolute prohibition ; and therefore this is a case not only where there is no law made prior to the act to punish the act, but a case where Congress is expressly prohibited from making any law to operate even on subsequent acts.

What is the law to be ? Suppose it is, as the honorable managers seem to think it should be, the sense of propriety of each senator appealed to. What is it to be ? The only rule I have heard, the only rule which can be announced, is that you may require the speaker to speak properly. Who are to be the judges whether he speaks properly ? In this case, the Senate of the United States, on the presentation of the House of Representatives of the United States ; and that is supposed to be the freedom of speech secured by this absolute prohibition of the Constitution. That is the same freedom of speech, senators, in consequence of which thousands of men went to the scaffold under the Tudors and the Stuarts. That is the same freedom of speech which caused thousands of heads of men and of women to roll from the guillotine in France. That is the same freedom of speech which has caused in our day, more than once, “order to reign in Warsaw.” The persons did not speak properly in the apprehension of the judges before whom they were brought. Is that the freedom of speech intended to be secured by our Constitution ?

Mr. Chief Justice and Senators, I have to detain you but a very short time longer, and that is by a few observations

concerning the eleventh article; and they will be very few, for the reason that the eleventh article, as I understand it, contains nothing new which needs any notice from me. It appears by the official copy of the articles which is before us, the printed copy, that this article was adopted at a later period than the preceding nine articles; and I suppose it has that appearance, that the honorable managers, looking over the work they had already performed, perhaps not feeling perfectly satisfied to leave it in the shape in which it then stood, came to the conclusion to add this eleventh article, and they have compounded it out of the materials which they had previously worked up into the others. In the first place, they said, Here are the speeches, we will have something about them; and accordingly they begin by the allegation that the President, at the Executive Mansion on a certain occasion, made a speech and, without giving his words, it is attributed to him that he had an intention to declare that this was not a Congress within the meaning of the Constitution, all of which is denied in his answer, and there is no proof to support it. The President, by his whole course of conduct, has shown that he could have entertained no such intention as that. He has explained that fully in his answer, and I do not think it necessary to repeat the explanation.

Then they come to the old matter of the removal of Mr. Stanton. They say he made this speech, denying the competency of Congress to legislate; and, following up its intent, he endeavored to remove Mr. Stanton. I have sufficiently discussed that, and I shall not weary the patience of the Senate by doing so any further.

Then they say that he made this speech, and followed up its intent by endeavoring to get possession of the money appropriated for the military service of the United States. I have said all I desire to say upon that.

Then they say that he made it with the intent to obstruct what is called the law "for the better government of the

rebel States," passed in March, 1867, and in support of that they have offered a telegram to him from Governor Parsons, and an answer to that telegram from the President, upon the subject of an amendment of the Constitution, sent in January before the March when the law came into existence; and, so far as I know, that is the only evidence which they have offered upon that subject. I leave, therefore, with these remarks, that article for the consideration of the Senate.

It must be unnecessary for me to say any thing concerning the importance of this case, not only now, but in the future. It must be apparent to every one, in any way connected with or concerned in this trial, that this is and will be the most conspicuous instance which ever has been or can ever be expected to be found of American justice or American injustice, of that justice which Mr. Burke says is the great standing policy of all civilized States, or of that injustice which is sure to be discovered and which makes even the wise man mad, and which, in the fixed and immutable order of God's providence, is certain to return to plague its inventors.

## ARGUMENT

IN THE

CASE OF THE UNITED STATES *versus* THE UNION  
PACIFIC RAILROAD COMPANY *ET AL.*,

*United States Circuit Court, Hartford, Conn., September 19, 1873.*

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The occasion on which this argument was made is described *ante*, vol. i. chap. xiv.

MAY IT PLEASE THE COURT :

I wish to make one or two remarks on this point of form which has now been started, before I proceed to what I desire to say on the merits of this motion.

This bill states that certain of the defendants are not residents of Connecticut, but of other States and districts, which are mentioned in the bill in connection with their names.

The record, including what is to be in it when the record is made up, contains certain summonses or subpœnas which have been issued to these parties, — those alleged to reside out of the district, — and the return of the marshal thereon shows that each one of them was not found in the district of Connecticut, but was found in the States and districts where they severally resided; so that this record shows on its face that, if nothing but the act of 1791, and some other acts of Congress which have slightly changed the act of 1791, are alone to be applied to this case, this bill must be dismissed. And therefore it is not only a proper subject of a motion in behalf of each one of these defendants so situ-

ated, but a motion is the only proper way in which the judgment of the court to dismiss the bill can be invoked.

If there were any fact here relied upon *dehors* the record, it would be proper to plead that additional fact not appearing upon the record, so that it should be a part of the record by a plea; but, inasmuch as every fact relied upon in support of this motion does now appear upon the record, a plea would be merely a change in the form of the heading of the paper filed; and the substance of the thing, and the facts which constitute that substance, would be precisely the same in the one case as in the other; and the decision of this court, either refusing to grant the motion and dismiss the bill, or granting the motion and dismissing the bill, in either event would be a decision reviewable, upon appeal, by the Supreme Court of the United States. Because, if the court should grant our motion and dismiss the bill, that would be a final decree, as has over and over again been held. On the other hand, if the court should overrule our motion, and refuse to dismiss the bill, and proceed with the case, when an appeal shall carry this record to the Supreme Court of the United States, the same question which arises here now, on this motion, would arise there as a preliminary question of jurisdiction.

I submit that these motions are proper in point of form, that they are suited to raise all questions which can be raised, and to place them in as favorable a condition to preserve the substantial rights of the parties as any form which could be adopted. And I add to this, may it please your Honors, although motions are oftentimes, and perhaps generally, appeals to the discretion of the court, this is not such an appeal. A motion to quash an indictment, for instance, is an appeal to the discretion of the court; and it has been held that overruling such a motion is not the subject of a writ of error, for the reason that it is an appeal to the discretion of the court.

This is not such an appeal. This is an appeal to the

law of the land, to be administered by the court and applied to the case without the exercise of any discretion whatsoever.

I pass from this subject to the merits of these motions; and I wish to say, as a general remark, that I shall not find it necessary, in what I have to say to the court, to comment on the particular cases, which have been collected with so much industry and skill, in what the senior counsel on the other side has rightly called the excellent brief of his junior; not because they are not worthy of examination and consideration by the court in connection with this case; not because some observations might not be made upon each of them which would be pertinent, according to the view which we take of the law; but because it has never been my habit, and I have never thought it expedient or useful, to reply in that detailed course to an argument on the other side, when the argument which I have to submit, and the principles on which I shall rely, in no manner conflict with any one of the decisions that has been produced.

If I can succeed in placing before your Honors the views which I entertain myself, and if your Honors shall find those views to be sound, there will be found nothing in any of these cases, I venture to say, in conflict with these views. On the other hand, if your Honors should not find those views to be sound, then the ground upon which we have expected to support this motion fails, and it is immaterial to us what decisions are cited.

Your Honors are already aware that the principal inquiry in respect to these motions appears to be whether that clause of the Constitution of the United States which prevents a person from being deprived of life, liberty, or property without due process of law, is applicable to this case, and controls the provisions of this law of Congress, by force of which these defendants, not living here, are brought before the court. And before I speak particularly of the language of that clause, and attribute to it, or endeavor to attribute

to it, the effects which I conceive belong to it, I think it needful to ask your Honors' attention to the history of the clause itself, to the circumstances under which it was introduced into the Constitution, and to the evident object which it was designed to accomplish.

In the first place, then, I begin with this statement which not only your Honors, but every well-educated man in the country will assent to: that when the Constitution of the United States was formed and adopted, it was received universally as a fundamental principle of republican government that all citizens must stand equal before the laws of the land, and when the Constitution of the United States was proposed for adoption to the people of the different States in their conventions, one great difficulty encountered by the friends of the Constitution was the apprehension that that great principle had not been sufficiently secured by the provisions of the Constitution then proposed. It is impossible to read the discussions which took place preliminary to the presentation of the Constitution to the different conventions, in the "Federalist" and other publications of the day, without seeing that that was a great and prominent difficulty which the friends of the Constitution felt was to be encountered in asking the ratification of that instrument from the people. Well, they argued as well as they could, and certainly with great ability; and, so far as the immediate or the present adoption of the Constitution was concerned by the requisite number of States, with success, that the Constitution did contain sufficient provisions to secure the perpetual and uniform application of this great fundamental principle. In the first place, they relied upon the fact, and reiterated it in every possible form, that the laws to be made were to be made by representatives who would be themselves bound by them; and, secondly, that the constituents of these legislators, who had sent them there, would also be bound by them, and that would secure, or tend to secure, the requisite uniformity in the application of this

great principle. They relied further upon particular provisions of the Constitution,—upon the trial by jury, upon the administration of the laws by a separate and independent judiciary, and upon some other minor provisions of the Constitution,—which they insisted were sufficient to secure this great end; and the adoption of the Constitution was made by the requisite number of States and went into operation.

But though the people of the United States were not willing to forego the opportunity then presented of forming a new and better government than they then possessed, they were not satisfied upon this point and subject; and in consequence of their dissatisfaction, under the direction of the ablest lawyers and statesmen that then existed in this country, the people, by a separate act of their sovereign power, inserted, among other provisions, this one which is now in question; and they inserted it, beyond all doubt, for the purpose of closing up every gap which had been left in the construction of the original constitution, whereby any inequality of citizens before the law could be created by the legislative power.

Now, may it please your Honors, it is in the light of these historical facts, known beyond all dispute, that the language of this clause is to be construed. It is when considered or taken along with the consideration of the end and purpose for which this special act was passed by the people of the United States,—it is in considering that, and the circumstances under which it was passed,—that we are to turn to see what was said for this purpose.

Now, I take it to be an established rule, to which the good sense of every man will, I think, subscribe, that no court is authorized to put upon the language of any clause of the Constitution, important or unimportant, original, or inserted by amendment, a construction which shall deprive that clause of its ability to attain any part of the end for which it was inserted; provided always the language of the

clause, when properly considered, is sufficient, completely and effectually, to attain that end. I agree that in the first place you are to ascertain for what end the clause was inserted; in the next place, whether the proposed interpretation will deprive it of any part of its power to attain that great end, or any part of that great end; and, in the third place, whether you can fairly, without distorting the meaning, so construe it that it shall completely and perfectly attain that end.

Now, let us look at this thing. "No man shall be deprived of life, liberty, or property without due process of law." In the first place, what is meant by "due process of law"? Those words have been construed by the Supreme Court of the United States, in an opinion given by Chief Justice Marshall, cited in our brief (I do not mean the words occurring in this clause of the Constitution, but the same language occurring in an act of Congress), and the construction was one to which I think every lawyer must assent, that due process of law includes every act of the court, from its first issue of mesne process to call parties before it, down to the last act in issuing execution and causing its judgment to be executed.

Every step taken by the court in a suit brought before it is process of law.

This, then, is not any distorted construction of this language of the Constitution. When you are considering how you can construe it in such a way as to carry out and perfectly attain the object fully and fairly for which it was inserted, you are not called upon to put any distorted construction upon these words; when you know that they cover the first act of court in issuing the process, and every thing it does afterwards till the case is finally disposed of, their natural meaning, without any distortion, is broad enough to cover all we ask in this case.

The other side seem to maintain—they have not done so in so many words, but I infer that is their view—that it

does not include mesne process by which the court calls parties before it.

Why, if it please your Honors, suppose Congress should enact that in a particular class of cases the court shall proceed *ex parte*, without any notice, and shall apply the principles of jurisprudence, the statute law, or common law, or equity law, to that case, just as in all other cases, and so proceed to adjudge it. Would not this clause have the effect to say that such a proceeding as that was not due process of law? Because you had not given notice to the party, you had not taken the first step in the process; and therefore the judgment which is rendered against him deprives him of his property without due process of law. Would any lawyer question that?

And, may it please your Honors, is it not easy to take the next step? If Congress has not the power, by reason of this provision of the Constitution, securing due process of law to cause a court to proceed without notice to a party, can they cause the court to proceed with notice to the party, but impose onerous conditions upon that party, without the performance of which the notice is to be of no avail to him? Suppose that in a particular case the act said you must give him notice, but you shall not allow him to appear unless he incurs a particular expense, or pays a particular sum of money, or performs some other onerous condition not imposed on citizens generally? Has Congress power to do that? Is the right of a party to appear and defend himself, which is so sacred that it is recognized in all systems of jurisprudence,—can that right, which cannot be taken away, be incumbered with any conditions which Congress chooses to impose upon it, although all other citizens are free from all these conditions? I respectfully submit not.

Now what was the state of the law, and why was it the law, at the time when this act in question was passed? Judge Washington, in the case which my colleague referred to yesterday, has given one of his clear statements of the

nature of the judicial jurisdiction under the Constitution and laws of the United States; and, he says, what every one must know to be true, that if Congress had not taken the course it did in the act of 1789, in regard to processes running out of the district, it would have been an intolerable burden to the citizen; and your Honors see that it would have been so. Why, what would Congress itself say at any time, what would it have ever said, and what would it be likely to say in the future, to the proposition of a general law by which any citizen of California who had a claim against any citizen of Connecticut might summon him across the continent to answer to that claim? Why, it would be an absurdity to make such a proposition. The answer would be, it could hardly be submitted to; the burden would be intolerable; we cannot pass any such law; we cannot impose upon the citizens of the country, generally, the duty of travelling these vast distances, and incurring these greatly increased expenses, to say nothing of other practical difficulties; we cannot impose that upon the country generally.

Well, if it is so enormously burdensome, as everybody must see it is, that is the condition imposed upon these defendants. You may appear and be heard, but you must comply with these conditions, so onerous that no general law could be passed affecting citizens generally, otherwise you shall not be heard.

Now, will it be contended that a citizen is not deprived of his property without due process of law, unless the law which controls the trial is not due process of law?

I understand the argument to go to that length on the other side. If so, the observations which I have submitted, showing the necessity for an opportunity of appearing and defending, unrestricted by these intolerable, burdensome conditions, must satisfy your Honors, I think that the scope of this language of the Constitution is much broader than has been conceded on the other side.

Why, if you come to the precise inquiry into dollars and cents, does it not deprive a citizen of his property to compel him to travel two thousand miles more than you compel another citizen to do to defend himself against a particular claim, whether he goes himself, or whether he sends the counsel whom he habitually employs? And when he resorts to inquiries what he can do amongst these strangers, not a man of whom lives within a hundred miles of the court-house that he has ever seen or heard of, is he not deprived of some of his property, in order to do this? Can he do it without expense? Can he do it, not merely without expense of his own time and labor and anxiety, but must he not incur additional expense?

I submit that the court will take judicial notice that that which Judge Washington calls an intolerable burden is a burden which carries along with it some dollars and cents, and it does not matter how many or how few. I respectfully submit that, when Congress required these defendants, who are classed in this act as clearly as if they had been nominated by their Christian and surnames, to submit to these onerous conditions, or otherwise depriving them of their property by a decree, that was not due process of law. Therefore, not without anxiety as to the results to which your Honors may come, it does seem to me there can be but one answer to that question: therefore, allow me to call your Honors' attention to the fact that you are not construing an ordinary statute, but a great and important provision of the fundamental instrument of this Government, which ought to be extended, so far as its language will fairly admit, to accomplish that equality before the law which, as I have said, is the great fundamental principle of republican government.

I pass from this point of the argument to the question whether an executor or administrator can be called here; and on that it seems to me necessary to say but a very few words.

That cannot be due process of law, I respectfully submit, which calls on a person in a fiduciary relation to appear and defend a suit which he has no power to appear and defend. You might as well give notice to the first man the marshal should meet in the street, as to give notice to a person who has no authority — if he has the notice — to appear and defend.

Now, there is nothing better settled than that the powers not only of administrators, but of executors, who, as held by the Supreme Court of the United States in the case referred to in our brief, derive their authority not from the will, but from the letters testamentary, there is nothing better settled than that their power and authority to sue and be sued is limited to the territorial jurisdiction of the State from which that authority is derived. And, when you call upon an administrator or executor to come here and answer to a suit, you call upon him to do what the law says he has no power to do. And, what is more, you call upon him to do what Congress cannot give him the power to do. There cannot be found any thing in the Constitution of the United States, special or general, which will enable Congress to pass an act increasing the powers of executors and administrators appointed by the States; and, therefore, no help can be derived from the provision of this act, had there been one, — which there is not, — that administrators or executors might be summoned here.

There is a provision of the act that, if parties die during the pendency of the suit, an executor or administrator may be summoned in. Of course he cannot be summoned in until he is appointed. Now, the act gives no particular direction, or even intimation, how he is to be appointed. If he is to be appointed in the State where the decedent resided, why, the same difficulty would occur that I have already been insisting on. If, in fact, he should be appointed in the State of Connecticut, where the suit is pending, then he has authority to appear in the limits of that

State and defend the suit; and the court might summon him, and in that contingency only, I respectfully submit.

There is one other point which it will be necessary for your Honors to pass upon, and concerning which I wish to say so much as will make my view of the act apparent to the court. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall from time to time establish.

Now, to establish one of these inferior courts includes establishing its jurisdiction,—conferring and defining its jurisdiction: of that there can be no question. As all the circuit courts existing in the country were from time to time established by Congress, their jurisdiction was assigned to them; not always the same jurisdiction, I agree, for certainly it is not necessary that every circuit or district court in the country should possess identically the same jurisdiction. Congress may assign more or less to one than to another, but Congress must assign it: the court must possess it by the will of Congress, constitutionally expressed, that that court should possess it. The responsibility rests with Congress: the power is in Congress, and is there alone.

Now, here is an act which provides for the institution of one suit. The Attorney-General, it is said, is to file a bill: then the character of the bill is given. There can be but one suit. Then it is said this suit may be brought in any district in the country. It is not required that some of the defendants should reside in that district: it might be brought in any district in the country. Well, that is equivalent to an expression by Congress that the court of the district where the suit is brought is to possess the necessary jurisdiction to sustain the suit and grant the relief required. That must necessarily be taken, as it seems to me, to be an expression of the will of Congress that the one court in which this suit is brought is to possess this necessary juris-

diction over that one suit, and no other court does possess or can exercise it.

And, among other things, it is provided, in so many terms,—and it is quite important to advert to those terms —that on filing the bill writs of subpœna may be issued by said court (that is, the court in which the bill is filed) against any parties defendant.

On filing the bill, the court possesses jurisdiction over that suit which no other court possesses,—granted, I agree, by Congress, and not by the Attorney-General: it possesses that jurisdiction; and, on filing the bill, it possesses this extraordinary power of sending its subpœnas into any district. Now, where has Congress failed to perform that duty, assigned to it by the Constitution, to establish the jurisdiction of the court, the one court? They have failed because they have not designated what one court. They have left that to be designated by the Attorney-General, and it is according to his will that this act comes into operation and applies to this court, because it is according to his will that he files the bill here.

I respectfully submit to your Honors that Congress had no power to delegate to an executive officer of the court the right to select a particular court, which should have a jurisdiction over a particular suit, over which jurisdiction was possessed by no other court; leaving it to his discretion which court should have that jurisdiction.

Your Honors will not misunderstand me. Congress stopped short of its duty. After describing what the jurisdiction should be, and that some one court should possess it, it stopped short of its duty in not taking that responsibility that belonged to Congress alone to say what court that should be.

Your Honors can well see to what enormous abuse this power, if it existed, would be subject. The bill may be filed in any district; the process is to run into any district; an executive officer is vested with authority to say where

that bill shall be filed, and to that place everybody must come. And what a means of rewarding friends or punishing enemies this might be! Of course I do not mean to impute to the eminent gentleman to whom this authority was confided any thing but the purest intentions in any action which he has taken upon this subject: that is not the question. It is a question of power, not of its mode of use after it has been obtained. And I respectfully submit that, when the Constitution says that Congress is to execute this power of defining and conferring the jurisdiction, they stopped short when they failed to point out the particular court which should possess it, and left an executive officer to exercise that enormous power.



## INDEX TO VOLUME II.

---

- ABSOLUTE GOVERNMENT**, in Europe, political ignorance security for, 1-13.  
Allegations, verification of, 160.  
**American Revolution**, causes of, in New England, 21.  
Antelope, case of the, 85, 90.  
**Antinomian controversy**, 36  
Articles of Confederation, 223, 227, 240.
- BACON, LORD**, extract from, on the Commons, 6.  
**Bill of Rights**, in Massachusetts, 18, 49; in Ohio, 183.  
Bowdoin Prize Dissertations, 1, 18.  
Bradstreet, Governor, influence of, 16.  
Burke, Edmund, quoted, 11.
- CAMBRIDGE PLATFORM**, quoted, 27, 55.  
Caphart, John, agent of owner in the case of Shadrach, 172.  
Carlin, Governor, of Illinois, quoted, 129.  
Carolina, colony of, 58; John Locke drafts constitution of, ih.  
Chapman, R. A., commissioner to reform legal proceedings in Massachusetts, 171.  
Chase, Judge, impeachment of, 186.  
Chitty on Pleading, cited, 219, 220.  
Church and State, union of, 26, 55.  
Citizenship, opinion in regard to, 229 et seq.  
Clergy, the, of New England, 29.  
Coke, Lord, cited, 158, 188, 195, 204, 367, 370.  
Colleges, New England, 34, 36, 37.  
Commander-in-chief, authority of, 327.  
Common schools in New England, 34.  
*Commonwealth v. Aves*, 69; Chief Justice Shaw's opinion in, quoted, 249, 250.  
*Commonwealth v. Bowen*, 208, 209.  
**Confederation of New England**, 22; Rhode Island not a member of, 28.  
**Constitution of United States**, provides for rendition of fugitives from slavery, 82 et seq.; law of Louisiana in reference to banks, in conflict with, 127; authorizes foreign states to sue in our courts, 145; provides for trial of crimes by jury, 176; supreme law of the land, 177 et seq., 299, 312; does not make juries judges of the law, 190; quoted, 196; defines who shall be citizens, 230; not made exclusively for the white race, 237; provision in, as to new States, 273; use of the word "regulate" in, 279.
- Cotton, John, influence of, 16.  
**Congress**, power of, over territory of United States, 266 et seq.; power to admit new States, 273; to make necessary laws and regulations for all the territory of the United States, 273 et seq.; to regulate commerce, 290.
- DANE, NATHAN**, ordinance for government of Northwestern Territory, 70, 252.
- Debree, John, claimant of the slave Shadrach, 172.
- Debts of the States**. *See* States, Debts of.
- Declaration of Rights**, 43.
- Deerfield, address delivered at, 39-61.
- Dred Scott, dissenting opinion in the case of, 213-305; jurisdiction of Circuit Court denied, 213; authorities cited, 219 et seq.; slaves, when manumitted, citizens, 224 et seq.; Articles of Confederation quoted, 227; Constitution deprives no persons of right of citizenship, 229; not made exclusively for the white race, 237; free colored persons citizens of United States, 245; opinion of Chief Justice Shaw in *Commonwealth v. Aves* quoted, 249, 250; citizenship of the plaintiff, 250 et seq.; ceased to be a slave when brought into Wisconsin, 252, 262; opinion of Chief Justice Gamble of Missouri, 264;

- cession of territory by States to the United States, 267 et seq.; power of Congress over territories, 273 et seq.; to protect slavery in, 282 et seq.; cases of exercise of this power, 285 et seq.; opinion of Judge Curtis that the acts of Congress prohibiting slavery in these territories are constitutional and valid, 304; that the judgment of the Circuit Court should be reversed, 305.
- Drinking-houses and tippling-shops, act for suppression of, 191; Judge Curtis's opinion on the validity of, 191-204; violation of the right of trial by jury, 192; in conflict with the Constitution, 194 et seq.
- Dudley, Governor, influence of, 16; embarks for America, 17.
- EAST, policy of sovereigns of the, 10.
- Ellenborough, Lord, quoted, 73.
- Evelyn, John, diary of, quoted, 21, 22, 52.
- Executive power, pamphlet on, 306-335; President Lincoln's proclamations, 306, 307; orders of Secretary of War, 308; importance of, 309 et seq.; right and duty of the people to examine them, 311; nature and extent of powers assumed, 314; source of these powers, 317; no grant of them in the Constitution, 320; President no such power as commander-in-chief, 322; he cannot make laws, 323; military law, 324; martial law, ib.; assertion that "rebels have no rights" untrue, 329; a wise people jealous of power, 334.
- FEDERALIST, the, quoted, 178, 411.
- First settlers of New England, institutions of the, 13; creed of, 25.
- Fugitive slave law, held to be constitutional by Supreme Court of Massachusetts, 175.
- GAMBLE, CHIEF JUSTICE, of Missouri, his opinion quoted, 264.
- Grace, case of the slave, 71, 87.
- Greene *v.* Briggs, case of, 191-204.
- HAMPDEN, JOHN, 18, 364.
- Harvard, John, founder of the College, 37.
- Husband and Wife, 168.
- Hutchinson, Governor, cited, 20.
- Habeas Corpus, proclamation suspending the, 307.
- IMPEACHMENT, of Judge Chase, 186; of President Johnson, 343 et seq.
- Indiana, debt of, 128.
- Indians, territory of New England purchased from, 19.
- Illinois, debt of, 129.
- JAY, CHIEF JUSTICE, opinion whether juries are judges of the law, 184.
- Johnson, Isaac, embarks for America, 17.
- Johnson, President, impeachment of, 343; argument in defence of, 343-422; Constitution requires a trial, 343; removal of Mr. Stanton, 345; not a violation of the tenure of office act, 355; power of removal in the President, 361 et seq.; charge of conspiracy with General Thomas, 403; what are impeachable offences under the Constitution, 409.
- Judiciary Act, the, 145, 214.
- Juries, not judges of the law in criminal cases, 176-190; Lord Mansfield's opinion on, 181; law of England, 182; to be directed by the judge in all cases, 182; opinion of Chief Justice Jay on the subject, 184.
- Jury, right of trial by, established by the Constitution of the United States, 176, 192; by that of Rhode Island, 192.
- KENT, CHANCELLOR, quoted, 373.
- LECHFORD, THOMAS, quoted, 26, 55.
- Legal Proceedings, report on reform of, in Massachusetts, 149-171; defects of, 149, 150; want of system in, 151; special pleading, 151 et seq.; objections to, 155; reforms suggested, 159 et seq.; verification of allegations, 160; forcible entry and detainer, 162; witnessesa, 164; husband and wife, 168; examination of parties, 168-170; draft of an act in relation to, 171.
- Legrand *v.* Darnall, case of, 246.
- Libel, action for a, against Daniel Wells of Greenfield, 62; Mr. Curtis's brief for defendant, 62-68.
- Lincoln, President, his emancipation proclamation, 306; proclamation declaring martial law and suspending the habeas corpus, 307.
- Locke, John, drafts Constitution of Carolina, 58, 159.
- Lord, N. S. commissioner to reform legal proceedings in Massachusetts, 171.
- Louisiana, debt of, 126.
- MADISON, JAMES, quoted, 418, 419.
- Magna Charta, referred to, 42, 64, 195, 204.
- Mansfield, Lord, quoted, 75; declares juries not judges of the law, 181.
- Marshall, Chief Justice, quoted, 85, 146, 303, 368, 374, 376.
- Martial law, defined, 324 et seq.
- Maryland, debt of, 111.
- Massachusetts, quo warranto against charter of, 20; superior power of, in New England confederacy, 23; union of church and state in, 26; account

- of the Colony of, 47 et seq.; Bill of Rights of, 49; commission to reform legal proceedings in, 171.
- Mathews, Mr., restrained from preaching, 26.
- Michigan, debt of, 122.
- Med', case of the slave, 69-92.
- Military law, defined, 324.
- Military officer, domicile of a, 256.
- Mississippi, debt of, 117; word "repudiation," first used in, ib.
- Morris, Judge, of Indiana, decision of, in relation to fugitive slaves, 91.
- Morris, Gouverneur, moves clause in Constitution for admission of States into the Union, 273.
- Morris, Robert, indictment for rescue of the slave Shadrach, 172; Judge Curtis's charge to the jury, 172-175; his opinion in the case, 176-190.
- NEW ENGLAND**, character of people of, resulting from civil and religious institutions of first settlers, 13-38; Confederation of, 22; creed of first settlers, 25; early clergy of, 29, 33; common schools of, 34; colleges of, 36, 37.
- North America, colonists of, 41.
- North American Review, article on Debts of the States in, 93-148.
- North Church, Boston, 26.
- OFFENCE** of obstructing process of the United States, 205-212. *See United States.*
- Officer, domicile of a military, 256.
- Olmsted, Asa, action for libel against Daniel Wells, 62; Mr. Curtis's brief for defendant, 62-68.
- Ordinance of 1787, abolishes slavery in the Northwestern Territory, 70, 252.
- PARKER, CHIEF JUSTICE, quoted, 209.
- Pennsylvania, debt of, 107.
- Peters, Hugh, 31.
- Pleading, special, 150 et seq.
- Plymouth Company, 17.
- Political Ignorance, security for absolute government in Europe, 1-12; accompanied by indifference to interests of society, 5.
- Pothier, quoted, 73.
- Public Opinion exercised only by an enlightened people, 7.
- Puritans, the origin of, 14-44; causes which brought them to America, 15; love of liberty, 46.
- QUO WARRANTO, issued against Massachusetts charter, 20.
- RALEIGH, SIR WALTER, 42.
- Randolph, Edward, arrives in New England, 21; quoted, 53.
- Reed, Chief Justice, of Lower Canada, decision of, 77.
- "Regulate," use of the word in the Constitution, 279.
- Reform of legal proceedings in Massachusetts, 149-171. *See Legal Proceedings.*
- "Repudiation," word first used in Mississippi, 117; true meaning of the word, 133; is confiscation, 140; effects produced by, 141.
- Rhode Island, not a member of the Confederation of New England, 28; act for suppression of tippling-shops in, 191.
- Rousseau, theory of civil society, 58.
- SHADRACH**, arrested as a fugitive slave, 172; charge to the jury in the case of, 172-175; rescue of, 174.
- Shaw, Chief Justice, opinion of, in Commonwealth *v. Aves*, quoted, 249, 250.
- Sheppard *v. Graves*, quoted, 217.
- Slave Med', case of, argument of Mr. Curtis in, 69-92.
- Slavery, not immoral, 84; introduced by custom, not positive law, 88; decision of Judge Morris in relation to, 91; contrary to natural right, 292; created only by municipal law, ib.
- Slaves, when manumitted, become free-men, 225.
- Sommerset's case, 75, 86 et seq.
- Special Pleading, 150 et seq.
- States, Debts of, article on, 93-148; origin of, 94 et seq.; debt of Pennsylvania, 107; of Maryland 111; of Mississippi, 117; word "repudiation" first used, ib.; debt of Michigan, 122; of Louisiana, 126; of Indiana and Illinois, 128; duties of States in relation to, 130; meaning of the word "repudiation," 133; means confiscation, ib.; credit of the country impaired by, 141; connection with our foreign relations, 143; conduct of States in regard to British debts in 1792, 144.
- Stephen on Pleading, cit'd, 219, 221.
- Story, Justice, his Conflict of Laws quoted, 71, 73, 78; Commentaries on the Constitution, quoted, 369.
- Stowell, Lord, opinion in the case of the slave Grace, 71, 87.
- Sydney, Algernon, 18.
- TANEY, CHIEF JUSTICE, character and public services of, 336-342; resolutions of the Boston Bar, 336; address by Judge Curtis, 337.
- Tenure-of-Office Act, President Johnson impeached for violating, 845 et seq.
- "Territory," meaning of the word, 274.

- Trial by Jury, right of, established by Constitution of United States, 176, 192; by that of Rhode Island, 192.
- UNITED STATES, obstructing process of the, 205-212: an offence against the laws, 206: not necessary to prove violence, 207; Chief Justice Parker on, 209; all laws equally to be enforced, 211.
- United States *v.* Robert Morris, charge to the jury in the case of, 172-176.
- United States *v.* Union Pacific Railroad Co., argument in the case of, 423-435.
- United States Bank, of Pennsylvania, issue bonds, 105; opposes resumption of specie payments, 106; again stops payment, ib.; connection with Michigan State bonds, 123.
- VATTEL, quoted, 73, 74, 91, 129.
- WASHINGTON, address delivered at Deerfield on the anniversary of his birth, 39-61.
- Wells, Daniel, suit against, for libel, by Olmsted, 62-68.
- Winslow, Josias, letter of, 19.
- Winthrop, John, influence of, 16; embarks for America, 17; cited, 20.
- Witnesses, provisions concerning, by Massachusetts laws, 164 et seq.
- Woodbury, Justice, states what martial law is, 324.
- Wordsworth, William, quoted, 13.











